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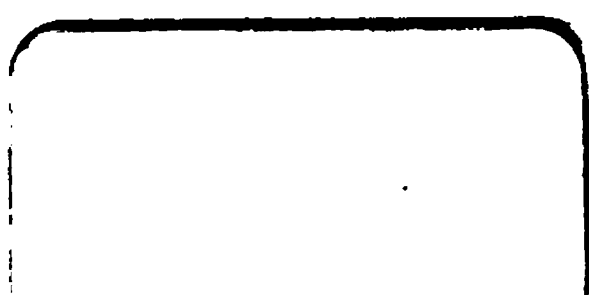
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BY

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73 N. C.; 74 N. C.; 78 PENN.; 79
PENN.; 80 PENN.; 48 VT.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1877.

121661

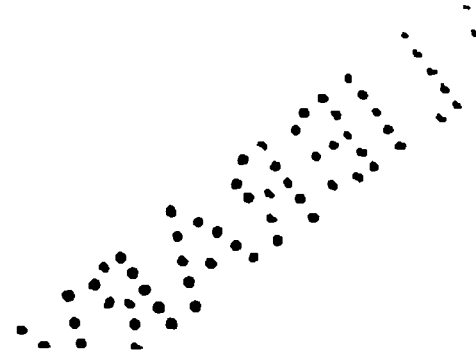
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CASES
IN THE
S U P R E M E C O U R T
OF
PENNSYLVANIA.

ROYAL INSURANCE COMPANY v. ROEDEL.

(78 Penn. St. 19.)

Fire insurance — contribution by several companies.

Three companies insured goods in every part of a building. One of them made a further insurance of goods in the upper stories, only. A loss occurred, which, in the lower stories, exceeded the amount of the first insurance, and in the upper stories exceeded the amount of the second insurance. *Held*, that the second insurance was payable in full, and that the first policies did not contribute to it.

ACTION by Roedel and another, trading as Roedel & Co., on a policy of insurance. The facts, as appeared by the case stated, were as follows :

The plaintiffs occupied a building in Philadelphia as shoe dealers and manufacturers. The first and second stories were used as sales-rooms, and the third and fourth as a factory. Upon the stock, etc., in the entire building was insurance to the amount of \$20,000, \$10,000 of which was in defendant's company, and the balance in two other companies. Upon the stock and machinery upon the third and fourth floors the defendants had additional risks to the amount of \$10,000 by separate policies. A loss occurred which amounted in the entire building to over \$41,000, \$29,000 of which occurred in the first and second stories and about \$12,000 in the third and fourth stories. Each of the policies contained a contributory or average clause.

The defendant claimed that the other two companies were bound to contribute to the loss in the third and fourth stories. The judgment was for the plaintiffs, and the defendant took a writ of error.

J. V. Darling and *M. P. Henry*, for plaintiffs in error, cited *Merrick v. Germania Fire Ins. Co.*, 4 P. F. Smith, 277 ; *Harris v. Ohio Ins. Co.*, 5 Ohio, 467 ; *Phillips on Ins.*, § 866 ; *Ogden v. East River Ins. Co.*, 50 N. Y. 388 ; *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265.

Mullan v. Philadelphia and Southern Mail Steamship Co.

E. G. Platt and *S. Dickson*, for defendant in error, cited *Sloat v. Royal Ins. Co.*, 13 Wright, 14; *Howard Ins. Co. v. Scribner*, 5 Hill, 298; *Harris v. Ins. Co.*, 5 Hammond, 466.

PER CURIAM. This case is ruled by that of *Sloat v. Royal Ins. Co.*, 13 Wright, 14. The loss, in this instance, exceeds the entire insurance in all the policies, general and special. The loss in the first and second stories of the building, which was not covered by the special policy in the subject in the third and fourth stories, largely exceeded the entire amount of the general policies. So the loss in the third and fourth stories exceeded the amount of the special policy, which was confined to the subject in those upper stories. It is clear, therefore, that the general and special policies covered in fact different subjects, and that the loss under each was more than sufficient to exhaust its entire amount. A rule of average which would exempt the general policies from a portion of their peculiar loss below, in order to carry it to the relief of the special policy above, and thus to exonerate each from a portion of a total loss of different subjects, would directly contradict the very spirit and intent of the contract of insurance; the subjects being different, and the loss upon each being greater than the insurance on each specially applicable to it, it is evident that the average would effectuate no equity it was intended to cover. We do not think *Merrick v. Ins. Co.*, 4 P. F. Smith, 277, is sufficiently clear on this point to overrule *Sloat v. Ins. Co.*, 13 Wright, 14. *Judgment affirmed.*

MULLAN V. PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP CO.

(78 Penn. St. 25.)

Master and servant — liability of master for injury to servant — who are fellow-servants.

Where a master places the entire charge of his business or a distinct branch of it in the hands of an agent, exercising no discretion and no oversight, the negligence of the agent in supplying and maintaining suitable instrumentalities is a breach of duty for which the master is liable. Whether the master has thus surrendered to an agent the charge of his business is a question for the jury.

In an action by a servant against his master to recover for injuries alleged to have been negligently caused by an agent of the master's, it is for the jury to determine the cause of the injury, the relation of the alleged agent to the parties, and whether the injury was occasioned by a risk assumed by plaintiff as an incident of his employment. (See note, p 7.)

Mullan v. Philadelphia and Southern Mail Steamship Co.

ACTION on the case by Mullan against the Steamship Company to recover for injuries alleged to have been occasioned to plaintiff through the negligence of one Corcoran, chief stevedore in defendants' employ.

The plaintiff was one of a gang of men employed by said Corcoran, to unload one of defendants' vessels lying at a wharf in Philadelphia, on the river Delaware. Whilst raising two tierces of rice by a rope, the rope, which had been spliced, parted at the splice. One of the tierces fell into the hold of the vessel where the plaintiff was at work, rolled upon his arm, and so injured it that it had to be amputated. The plaintiff, alleging that it was through the negligence of the defendants' servants that he was injured, brought this action.

Among other things, the plaintiff's evidence went to prove "that Corcoran was the chief stevedore; that he employed and discharged the men, but they were paid by the agent of the company; the men received their orders from Corcoran alone; he had the exclusive control and direction of them; there was no interference with him by any one. On the day of the accident, the vessel was being unloaded 'by a single fall — a single fall is where a pulley is attached to a gang-rope, and a rope passes over the pulley to one end of which is the load to be raised, and the other end is attached to the donkey-engine.' The rope was of the best kind; it had been spliced with a long splice, by which the rope where it is spliced is no thicker than it was originally. The rope had been used all day. The accident occurred about seven o'clock in the evening. The load was being taken from the bottom of the hold; it was rolled to the forward hatch, where it was hooked to the fall, raised to the deck and rolled out to the wharf. A weight on the single fall is apt to untwist the rope; the rope that parted was not sufficient, as a single fall, to unload two tierces of rice; it should have been used as a double fall, but there was not enough of this rope to weave a double fall. After the accident, a double fall was made from another rope. Two tierces at a time was taken by Corcoran's orders. It was his business to judge how much should be put on the fall."

At the close of the plaintiff's evidence, a nonsuit was ordered on the ground that the plaintiff and Corcoran were fellow-servants, and that, admitting the accident to have been caused by his negligence, the defendants were not responsible. The court in banc refused a rule for a new trial (9 Phila. 16), and plaintiff took a writ of error.

H. Hanson and D. Dougherty, for plaintiff in error.

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M. P. Henry, for defendants in error. The master is not liable to one in his employ for an injury by his negligence to his fellow-servant unless he so withdraws from the conduct of the business as to put the fellow-servant in his place; and if he furnishes safe machinery, etc., and competent superintendents, the master has done his duty. *Ardesco Oil Co. v. Gilson*, 13 P. F. Smith, 146; *Caldwell v. Brown*, 3 id. 453; *Ryan v. Cumberland Valley Railroad*, 11 Harris, 384; *Weger v. Penn. Railroad*, 5 P. F. Smith, 460. A foreman is not in the position of a deputy master. *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Gallagher v. Piper*, 16 id. 671; *Albro v. Agawam Can. Co.*, 6 Cush. 75; *Wright v. N. Y. Central Railroad*, 25 N. Y. 562. The company do not warrant that good material shall be properly used, or that the servants shall keep it in its original safe condition. *Hard v. V. & C. Railroad*, 32 Vt. 473; *Seaver v. Railroad*, 14 Gray, 466.

WOODWARD, J. The accident resulting in the injury of which the plaintiff complains, occurred while he was employed as one of a gang of stevedores in unloading the steamship Wyoming, belonging to the defendants. In hoisting two tierces of rice out of the hold of the vessel, the rope the workmen were using parted, and the casks fell on the plaintiff. The hands employed were under the charge of John Corcoran, the chief stevedore. He engaged and discharged them at his pleasure. He had charge also of the machinery used in unloading the ship. The rope, where it parted, had been spliced; it was used, as the witnesses explained, as a single fall; the weight at the end caused it to swing round and untwist, and the parting at the splice was the result. On the ground that the injury was the consequence of the negligence of Corcoran, and that he was a fellow-workman of the plaintiff, the court below directed a nonsuit.

There was evidence which would ordinarily be referred to a jury that the rope was unfit for the purpose for which it was used. While it was not asserted that its strength was weakened by splicing, the witnesses united in saying that it should have been used as a double fall, and that there was not enough of it for that purpose. One of them said, that "where a long splice runs over a pulley, the pieces where the end are tucked in will chafe against the pulley's sides;" and that "when a spliced rope is so used that a heavy weight is at one end, the rope will untwist, and the more it does that the more likely is the splice to come apart. When a single cargo fall is used, the weight at one end has a tendency to make the rope untwist, that is, if the weight is allowed to swing round, as it will naturally do. But where a double fall is used, both ends are made fast, and there can be no untwisting of the

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lag of the rope." Another witness, after stating the liability of the lumps in a long splice to chafe in going through a pulley, said: "In unloading the rice, I think a single fall with a splice ought not to have been used."

In order to warrant the nonsuit, it was requisite that it should appear affirmatively, not only that the accident was caused by neglect of duty on the part of Corcoran, but that he and the plaintiff held the relation to each other of servants in the common employment of the defendants. Admittedly, it is the duty of every employer of laborers to exercise reasonable care in providing them with safe machinery, suitable tools and appliances adapted to the uses for which they are designed. Did the defendants discharge their duty? On their part, it is insisted that they did. It is said that they intrusted Corcoran with the power to select all the machinery necessary for the work he was employed to superintend. The testimony on this subject that is found in the bill of exceptions consists, first, of the statement of Kennedy on cross-examination, that "the running rigging is in the mate's charge; the mate attends to receiving the rigging, and the stevedore judges of its fitness, and uses it or not as he sees proper;" and secondly, of the plaintiff's own statement, that "Corcoran had charge of the machinery and tackle of loading and unloading; I have seen machinery and tackle changed by his direction." In the opinion of the court below, it is said that "this rope had been spliced by the mate who had charge of the ship's running rigging, while coming up the river." It is assumed that the fact is so, and is contained in a portion of the testimony that has been overlooked.

It is conceived that the questions in this case were not such as could legitimately be passed upon finally by the court. Assuming, in the first instance, that Corcoran had entire control of the selection of the machinery, and that, consequently, the defect was one for which he was chargeable, it is difficult to see why the plaintiff should not have been permitted to ask the jury to find that the defendants had conferred on him such unlimited authority as to make him their representative, and to make themselves responsible for his default. "Where the employer leaves every thing in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the master's negligence, for which the latter is liable." Wharton's Law of Negligence, § 229; *Grizzle v. Frost*, 3 Foster & Fynlayson, 622. The principle that the master is exempt from responsibility to the servant for injuries received from the ordinary dangers of his employment, including the negligence of his fellow-servants, is too deeply imbedded in our law to be disturbed. But where a master places the entire charge of his business, or a distinct branch of it, in the hands

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of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master should be held answerable. The negligence of the agent, with such powers, becomes the negligence of the master. In this case there was some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants had been intrusted to the discretion of Corcoran. And just to the extent to which the proof went in fixing upon him the responsibility for the selection of the rigging and for adjusting and working it, did the same proof tend to establish the fact contended for by the plaintiff, that Corcoran was clothed, as to these duties, with the ultimate power and authority of the defendants. Upon the evidence submitted, it was the right of the plaintiff that a jury should pass.

If, in the next place, it should be found that the position of Corcoran, notwithstanding that he had charge of the gang of stevedores, was that merely of a fellow-workman of the plaintiff; that the rope had been spliced by the mate on the voyage from Savannah; and that Corcoran received it without knowledge of the defect that caused the accident, the question would be presented whether the plaintiff would still be affected by the rule exempting the master from liability. The risk of injury which a laborer assumes is that involved in the "circle" of his employment. "He and the fellow-servant causing the injury must be co-operating in the same business, so that the former knows that the employment of the latter is one of the incidents of their common service." Wharton's Law of Negligence, § 280. And the question that would be presented would manifestly be one of fact. A jury would be required to find whether the negligence of the mate was one of the risks which the plaintiff should be held to have assumed. The result would depend on what should be ascertained to be their relations to each other, the extent to which they were brought into contact, and to which they were engaged in a common employment, and the connection of the duties of each with the duties of the other.

It is not designed in any way to impair or affect the rule settled in the cases on which the court below relied. If it shall appear, in the event, that it was the duty of Corcoran to select the proper materials for the work that was to be done, that he held only the position of a fellow-workman of the plaintiff, and that it was an act of negligence on his part to receive the rope from the mate and use it, the facts, of course, would bar all right of recovery in this action. The cases which were the guide in the decision below, under the circumstances disclosed in them, were

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justly ruled, undoubtedly ; but they do not reach the questions presented here. The error consisted, not in adhering to the authorities, but in withdrawing from the jury the right to ascertain the cause of the accident, the relation in which Corcoran stood to the parties, and, if the accident was caused by the neglect of the mate, the responsibilities to which the plaintiff was subject as an incident of his employment in common with the mate, in the service of the defendants.

The offer to ask the plaintiff whether he heard any expression by Corcoran at the time of the accident, or immediately after it, concerning the rope, or concerning its insufficiency, ought, on the authority of *The Hanover Railroad Company v. Coyle*, 5 P. F. Smith, 396, to have been received as part of the *res gestæ*.

Judgment reversed, and procedendo awarded.

NOTE.—See *Gibson v. Erie Ry. Co.*, 20 Am. Rep. 552 ; *Ladd v. New Bedford R. R. Co.*, id. 331 ; *Patterson v. Pittsburgh, etc., R. R. Co.*, 19 id. 413 ; *Columbus, etc., v. Troesch*, 18 id. 573 ; *Corcoran v. Holbrook*, 17 id. 369 ; *Lawler v. Androscoggin R. R. Co.*, 16 id. 493 and the note thereto ; *Malone v. Hathaway*, post.—RMP.

McCUE V. COMMONWEALTH.

(73 Penn. St. 185).

Criminal law — trial — sentence — neglect to ask why sentence should not be pronounced.

The record of a capital conviction failed to show that, before sentence, the prisoner was asked if he had any thing to say why sentence should not be pronounced. *Held*, that the sentence should be reversed and the prisoner remanded for resentencing. (See note, p. 8.)

INDICTMENT for murder. On the trial the prisoner was convicted and sentenced to be hanged. Error to the Supreme Court.

J. J. Metzgar and H. O. Parsons, for plaintiff in error.

W. W. Hart, District Attorney, for Commonwealth.

AGNEW, C. J. [After deciding some unimportant allegations of error.] But there is one error for which the sentence of the court must be reversed. It does not appear from the record that the prisoner was asked before sentence, why sentence of death should not be pronounced upon him. This is a fatal error, and affects the merits of the case. It is

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necessary to ask the prisoner this, that he may have an opportunity, before the penalty of death be visited upon him, to plead in bar of the sentence any matter sufficient to prevent its execution. He may have found out some good reason why the trial was not legal, or he may plead a pardon, or supervening insanity. The question and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before the sentence can be pronounced. *Prine v. The Commonwealth*, 6 Harris, 104; *Dougherty v. The Commonwealth*, 19 P. F. Smith, 291. In this case the question may have been asked in fact, but as it does not appear in the record, and is a matter of substance, we must treat it as not having been done. In all high felonies and especially in cases of murder, the presiding judge should see that the record is made up properly, before the term is over.

The sentence will be reversed, in order that the case may be sent back, and an opportunity afforded to the prisoner to plead in bar of it, but this error will not reverse the trial and conviction. *Jewell v. Commonwealth*, 10 Harris, 94, 102.

NOTE.—The same question was considered in *Dodge v. People*, 4 Neb. 226; and the same conclusion reached. The court said:

“Section four hundred and ninety-five of the Criminal Code provides that ‘before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has any thing to say why judgment should not be pronounced against him.’ Gen. Stat. 832.

“It does not appear from the record that this requirement of the statute was complied with, or that the prisoner was present in court at the time sentence was pronounced, and counsel for the prisoner insist that there being error in this, we have no authority to either pass sentence, or remand the cause to the District Court with instructions to pronounce sentence in conformity to law, and therefore prisoner must be discharged.

“We are aware that cases can be found holding, under a statute similar to ours, that there is no authority in this court either to resentence the prisoner, or remand the case to the court below for that purpose. We may correct errors in any other respect, review the proceedings of the District Court, see that the accused has had a fair trial, and that his rights have been properly guarded and secured, but the moment it appears that the court has not fully complied with the law in pronouncing sentence, it is at once ousted of jurisdiction and the accused must go acquit. This doctrine, originating in England at a time when the courts of that country held that they had no authority to revise proceedings and judgments in cases of felony, and grant new trials, partakes of the reasoning of that period, that the judgment in a criminal case was absolute, unless a pardon was granted; that if the judgment did not conform to the law there was no power of revision or amendment; and as the prisoner could not be held on an invalid judgment he must therefore be discharged. This doctrine was expressly overruled in *King v. Kenworthy*, 1 Barn. & Cress. 711, and in *Regina v. Holloway*, 5 Eng. Law & Equity, 310; and the English courts now hold that they have full authority in such cases to impose the sentence required by law. In the case of *Beale v. The Commonwealth*, 25 Penn. St. 22, the court held: ‘The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court

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committed error in passing sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors and "minister justice," but such a course would perpetuate error, and produce the most intolerable injustice.' And to the same effect see *Benedict v. The State*, 12 Mis. 313; *Williams v. The State*, 18 Ohio St. 46; *Picket v. The State*, 22 id. 405.

"A person convicted of felony cannot waive his right to be present in court at the time sentence is pronounced, and he must be 'informed by the court of the verdict of the jury, and asked whether he has any thing to say why judgment should not be pronounced against him.' As it does not appear that these requirements of the statute have been complied with, the judgment must be reversed, and an order directed to the court below, to proceed to render judgment on the verdict in the manner prescribed by law. In the language of Judge DIXON in *Benedict v. The State*, 12 Mis. 313, 'this course appears to us not only rational and correct, but the only one which in many cases will save the justice of the State, in criminal proceedings, from being entirely defeated through the mistakes or oversights of clerks and other officers, in matters not reached or at all affecting the merits of the controversy or the legal rights of the accused.'

"This case is therefore remitted to the court below with directions to proceed to pronounce judgment on the verdict in the manner prescribed by the statute."

HARKINSON'S APPEAL.

(78 Penn. St. 196.)

Restraint of trade — aiding others in carrying on trade — injunction.

A woman sold a bakery and covenanted that she would not "engage in the same business directly or indirectly" in the same place for ten years. Within that time she established her son in the same business within the limits of the same place, advancing him money as she had done to her other children in their business. It was found as a fact that the business was carried on in good faith by the son and not by the mother, and no actual damage to the plaintiff was shown. *Held*, that the plaintiff was not entitled to an injunction to restrain the mother from permitting or aiding her son to carry on the business.*

BILL in equity for an injunction to restrain the defendant from permitting certain premises owned by her to be used as a bakery, or from aiding others in carrying on said business.

The bill alleged that the defendant, Elizabeth Harkinson, sold to the plaintiff, on the 11th of August, 1868, a bakery and confectionery establishment in the 22d ward of Philadelphia, covenanting, among other things, that she, the defendant, would not engage in the same business, directly or indirectly, within the limits of the 22d ward, within ten years, but that by her counsel and advice she would encourage and promote the

* See *Hubbard v. Miller*, 15 Am. Rep. 153; and *Callahan v. Donnelly*, 13 id. 172 and note

plaintiff's business. That the defendant, about April, 1870, bought a lot in the said 22d ward, and erected thereon a building for a bakery and confectionery, and had fitted it up as such under her own directions; and established a bakery and confectionery therein; that it was nominally in charge of her son, David Harkinson, but that defendant was really the manager, with allegations of damage to plaintiff and prayer for an injunction.

The defendant, admitting several of the allegations in the bill, averred that she did not know, when the agreement was executed, that there was a stipulation in it that she should not engage in the same business in the 22d ward; she admitted her purchase of the lot mentioned in the bill, and erection on it of a building adapted to the bakery business, etc., and that it was fitted for the purpose with the intention of having that business carried on there, but denied that the fitting up was under her directions; her intention in buying the lot was that her son, David Harkinson, might go into business there, that he made and furnished the plans, the fitting up was under his orders, and the money which she had expended in the lot, in building the house, etc., was in the nature of an advancement to him; that he was the real owner, and the business was carried on solely for his benefit. She denied that she had any control of the business, or that the business of baker and confectioner, which was carried on in the premises, had her encouragement or assistance, further than the advancement, etc., she had made to him, to enable him to go into business; she denied, also, the other allegations of the bill.

The case was referred to a master, who found, among other facts, that the defendant had made advances to her other children, and further, that in the spring of the same year, 1870, her remaining child David, who had been working in the confectionery and baking business, with his brother John Harkinson, in Germantown, asked his mother to set him up in business in Germantown. This she declined to do, "because it would not be fair to Mr Engard." Mrs. Harkinson, David and Marian went to Chestnut Hill, to look at Fox's bakery. They met a carpenter at Chestnut Hill, by whom Mrs. Harkinson was induced to purchase a lot of ground next to the depot of the Chestnut Hill Railroad, and to build thereon a house and the other appliances suitable for a bakery and confectionery. The title to this real estate was taken in her name; the general plans of the house, etc., were prepared by her son David, and she and he both took an active part in superintending the erection and fitting up of the establishment, complete in every respect for the business. For the lot and buildings she paid \$11,190. In addition to this, she furnished about \$1,200 for the purchase of the working utensils of the

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business, a large portion of which she personally bought and paid for, lists of articles being made out by David. All of this was done openly, and without any attempt at concealment, she stating to most of the parties from whom these purchases were made, that they were for him. There was no evidence to show that the plaintiff had any knowledge of all this at the time.

The place thus bought by her, built, fitted up and stocked, is within the 22d ward of this city, about four miles from Mr. Engard's store, near to the county line, next to the railroad depot, and the connection with Germantown by the railroad, is almost hourly every day, except on the Sabbath. The name put over the door was and is "Harkinson." David Harkinson moved to this place in August, 1870, and on August 1st, 1870, took out a United States license as a retail dealer for the year ending May 1st, 1871; and, with some means of his own, bought the articles necessary to start the business with: and he has continued to carry it on there ever since, paying the taxes on the place for the year 1871. Mrs Harkinson purchased some few things for him at the first, but of no great amount. There was some slight evidence that she had taken some part in the management of this business; but it was not enough to make one say that it was her business; and certainly, was not more than a mother would be expected to do, and would naturally do for a son, under the circumstances. Her course with him, as to this property and business, seems to have been pretty much the same as that pursued by her with her other children. It was in each instance loosely done, and with no very definite contract or agreement; but with a general understanding, that the children were getting in advance their shares of the estate which their parents had accumulated—in no event was the money in the case of either child to be returned; and the payment of interest was to depend upon success, and, most probably, would not be enforced at all.

Upon the whole evidence, the master reports, that the business carried on at the store in Chestnut Hill has been, and really is, the business of David Harkinson; and was and is not that of the defendant; and is managed and carried on by him on his own credit, and with his own means, and not by her.

There was no proof of any special damage suffered by plaintiff, by reason of the opening of this bakery and confectionery establishment, at Chestnut Hill, or that customers had left him and gone there.

The master reported that Mrs. Harkinson's conduct was a breach of her covenant with the plaintiff, and that she should be required by injunction to close the property as a bakery and confectionery until

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August, 1878, and that she be restrained for ten years from August 11th, 1868, from engaging directly or indirectly in that business, etc., within the limits of the 22d ward.

He recommended a decree in accordance with the prayers of the bill, except as to damage.

Exceptions were filed to the report of the master. The Court of Common Pleas overruled the exceptions, confirmed the report, and made the decree recommended by the master.

The defendant appealed to the Supreme Court, and in a number of specifications assigned the decree for error.

C. S. Pancoast, for appellant. There is nothing in the agreement to prevent merely a rival establishment, and no condition can be implied. *Midland Railway Co. v. London & N. W. Railway Co.*, Law Rep., 2 Eq. 524. The covenant is to restrain her personally, not to prevent her from setting her children up in business; such agreement would be against public policy, unreasonable and void; to be enforced, the contract must be reasonable. *Horner v. Graves*, 7 Bing. 743; *Morris Run Coal Co. v. Barclay*, 18 P. F. Smith, 173; *Gompers v. Rochester*, 6 id. 194. An injunction is not of right; a chancellor must regard not only the rights of the parties, but those also of others which may be involved. *Wood v. Sutcliff*, 2 Sim. (N. S.) 163; *Mayor v. Commissioners*, 7 Barr, 365; *Grey v. Ohio & P. Railroad Co.*, 1 Grant, 412; *Richards' Appeal*, 7 P. F. Smith, 113; *Clark's Appeal*, 12 id. 450; *Browne v. Newhall*, 1 Myl. & Cr. 570; *Bonaparte v. Camden & A. Railroad Co.*, Bald. 218; 2 Story's Eq. 959 b., note 5. The inconvenience of enforcing an injunction is a reason for withholding it. *Collins v. Plumb*, 16 Vesey, 454; *Deitrichen v. Cabbum*, 2 Phil. 52 (22 Eng. Chanc.); *Lumley v. Wagner*, 1 DeG., M. & G. 620; *Taylor v. Portington*, 7 id. 328; *South Wales Railroad Co. v. Wythes*, 5 id. 880; *Hoope v. Broderick*, 11 Sim. 47.

J. G. Johnson, for appellee. Damage is presumed to result from a breach of covenant, and the defendant will be restrained although no actual damage is proved. *Attorney-General v. Railway Co.*, Law Rep., 3 Ch. App. 104. The acts of defendant were indirectly engaging in the business. *Perkins v. Lyman*, 9 Mass. 522.

MERCUR, J. The first question which arises in this case is, has the appellant violated her agreement, not to engage, either directly or indirectly, in that business, the good-will of which she sold to the appellee?

Her husband had owned and carried on a bakery and confectionery establishment, in the 22d ward, in the city of Philadelphia. He devised

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most of his estate to the appellant absolutely, appointed her his sole executrix, and died leaving six children. She continued the business for a time, and then sold to the appellee the establishment, together with the good-will of the business, for a gross sum, in 1868. At the same time, she agreed not to engage in the same business, directly or indirectly, within the limits of the said ward, at any time within ten years from the date of said sale; but, by her advice and counsel, she would endeavor to encourage and promote the business interest of her vendee. During the life of her husband he had furnished one of their sons a few thousand dollars, with which he had entered into business. After the death of her husband the appellant had also furnished the same son several thousand more. She had also furnished a second son with an amount somewhat larger, to start him in business. In each case no obligation was demanded or given, nor had any of the money, or interest thereon, been repaid, nor does it appear that there was any distinct agreement of any kind for its return.

In 1870, appellant purchased a lot at Chestnut Hill, within the said ward, near the county line, but four miles from the establishment sold to the appellee. On it she built and fitted up a house, and the other appliances suitable for a bakery and confectionery. The general plan of the house and its appurtenances was arranged by a third son, David, and both he and his mother took an active part in superintending the erection and completion of the establishment. Having put over the door the name "Harkinson," she gave to her son David the possession of the establishment. He took out license as a retail dealer, and had continued to carry on the business down to the time of the hearing before the master. The master found and reported that "the whole evidence shows that Mrs. Harkinson did what she had done in pursuance of a plan pursued toward her other children, and which seems to have been understood and been acquiesced in by all of them."

There appears to have been no specific binding agreement between David and the appellant, but an understanding that after he should be thoroughly established in business he should pay her interest on the sum advanced, and in case of her death, the property was to be his; but if its value was more than his share of his father's estate, he was to make payment to his brothers and sisters of the excess. He thus took and held the possession, subject to an equitable adjustment, with his brothers and sisters, of its relative value on the death of his mother. He has paid no rent and no interest on the investment. Upon the whole evidence, the master reported "that the business carried on at the store in Chestnut Hill has been and really is the business of David Harkinson, and

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was and is not that of the defendant below, and is managed and carried on by him on his own credit, and with his own means, and not by her." Nevertheless, the master found that by furnishing the means and fitting up the establishment for her son, by which he was enabled to engage in the business, the appellant had violated the true intent and spirit of her contract. The case of *Perkins v. Lyman*, 9 Mass. 522, goes far toward sustaining that conclusion. Yet that case is distinguishable from the present in this : there, with an intent to violate his contract, with an intent to engage in the business from which he was excluded, he fitted up and owned a vessel for such a voyage. His design was to be interested in the business ; thus throwing his knowledge, skill and experience into competition with one, in violation of his agreement. In the present case the appellant did not erect nor furnish the establishment with any intention that she would engage in the business, or be in any manner interested therein. In furtherance of her plan for aiding her children, she had substantially advanced to him his supposed share in her estate. It was invested in that particular for his benefit, and not hers. The effect was the same as if she had given or loaned to him money, with a knowledge that he intended so to use it. It is certainly going very far to say that by the general terms used in this agreement a parent has covenanted to control the business of her son by withholding from him his share in her estate. Without deciding adversely to the conclusion of the master and court on this point, we think the case is not free from doubt.

2. Does the appellee present a case which should move a chancellor to enjoin the appellant against permitting the premises to be used in carrying on the business in which her son is engaged ? Is it a violation of such a character, and to such an extent, as to justify this specific remedy.

We have clearly shown that the appellant personally is nowise engaged or interested in the business, otherwise than by the master's assumed indirectness. So there is no occasion to enjoin her against doing what she has not done, and does not propose to do. Shall she turn her son out, or enjoin him against pursuing his business ? An attempt to do either might not be entirely successful.

It must be borne in mind that agreements in restraint of trade *generally* are void. To give validity to them they must be limited in time or partial in their operation, and be supported by a sufficient consideration. *Gompers v. Rochester*, 6 P. F. Smith, 194.

When a court of equity is called upon to enjoin a person against the free exercise of a trade, the violation of the agreement ought not to be

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doubtful. Hence, a merchant, who, upon selling his stock in trade and business, covenants not to carry on the same business at the same place or within certain limits surrounding, and who thereupon gives up his place of business, will not be enjoined from afterward soliciting and procuring orders within the specified territory — the question of whether this constitutes a breach of the covenant being regarded as too doubtful to warrant an injunction, without bringing an action. High. on Inj., § 743; *Turner v. Evans*, 2 De Gex, M. & G. 740. So, where one undertakes the management of the business of a chemist, having covenanted against carrying on the same business in his own name and for his own benefit, or in the name and for the benefit of any other person, within a certain radius, under a specified penalty named by bond, and he afterward solicits orders for another chemist within the limits specified, the effect of such conduct upon the covenant in question is regarded as too doubtful to warrant a preliminary injunction. High. on Inj., *supra*; *Clark v. Watkins*, 9 Jur. (N. S.) 142. If, however, one agrees not to set up or follow, or practice a particular business, and then acts as an assistant or manager in the business for another person, it is a violation of his covenant. *Dales v. Weber*, 18 Weekly Rep. 993. In such a case his covenant not only excluded him from interest or profit in the business, but also from personal employment therein. Nor is a covenant against engaging in a certain trade, or in any matter pertaining thereto, within a certain district, regarded as violated by loaning money to one engaged in such business, the loan being secured by mortgage on the business premises, even though the covenantor may know that the mortgagor's only means of repaying the money is out of the profits of the business. High. on Inj., *supra*; *Bird v. Lake*, 1 Hem. & Miller, 338.

"There is no power," said Mr. Justice BALDWIN, in *Bonaparte v. Camden & Amboy Railroad Co.*, 1 Bald. Cir. C. R. 218, "the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages." It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases. Story's Eq. Jur., § 959 *b*. Certainty is an essential element in the contract, whose enforcement is sought by injunction; and where a covenant is uncertain in its provisions, no injunction will be allowed. High. on Inj., § 720. So, too, it is usually requisite that the party aggrieved should show some appreciable damage, as the result of the breach of covenant which he seeks to restrain. *Id.* Where damages

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will compensate either the benefit derived or the loss suffered, equity will not interfere. *Grey v. Ohio & Penn. Railroad Co.*, 1 Grant, 412. So, where either party may suffer by the granting or withholding an injunction, the rule in equity requires the court to balance the inconveniences likely to be suffered by the respective parties, by means of the action of the court, and to grant or withhold the injunction according to a sound discretion. *Id.*; *Richards' Appeal*, 7 P. F. Smith, 105. A court of equity will not interfere if the damage is slight, and the nuisance is of a temporary character, so that damages at law would furnish an entire and adequate remedy. *Bisph. Eq.*, § 440. It was said in *Butler v. Burleson*, 16 Vt. 176, "when there is an express covenant, and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach." In *Olark's Appeal*, 12 P. F. Smith, 447, Mr. Chief Justice THOMPSON said: "Injunction is a remedy in equity, to restrain or prevent such acts of wrong, as would, if done, result in irreparable injury to the property of the complainant. No decree should ever be made to be followed by writ of injunction, unless this element be clearly established." There should be some irreparable injury, either committed or threatened, to justify an injunction.

In *McClurg's Appeal*, 8 P. F. Smith, 51, the question of injury sustained is not distinctly presented in the report of the case, yet, in the opinion of Mr. Justice SHARSWOOD, he clearly assumes it to exist, and cites with approbation the case of *Butler v. Burleson, supra*.

The appellant denies, in her answer, that she has encouraged and promoted the business of others with the intent and effect of injuring complainant; on the contrary, she alleges and avers that she has advised and encouraged the old customers of her place to continue their custom, and has endeavored to remove objections on their part to purchasing of the appellee. The master has found "there was no proof of any special damage suffered by plaintiff (below) by reason of the opening of this bakery and confectionery established at Chestnut Hill, or that customers had left him and gone there."

The master does not find that this establishment will be any more injurious to the appellee in the future than it has been in the past. The proof then not only fails to show irreparable injury to the property of the appellee, which cannot be compensated in damages, but shows that no appreciable damage has been done to, or suffered by him.

It is not the province of courts to decide abstract questions, but to determine relative rights, and to redress relative wrongs, according to the rules of law and equity.

The complaint here rests on an alleged violation of a contract. The

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fact of a violation is not free from doubt. The appellee has not sustained, nor has he reason to fear, any substantial injury to his property. Under all the circumstances, it is not a case that now calls for the exercise of the high power invoked. We think the learned judge erred in adopting the conclusion of the master, and in decreeing accordingly.

Decree reversed, and bill dismissed at the cost of appellee.

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(78 Penn. St. 228.)

National bank — usury — set-off

In an action by a national bank on negotiable paper discounted by it, the defendant may set-off the amount of usurious discounts on other transactions. The interest paid by the defendant beyond that authorized by the Act of Congress belongs to him, and the bank can hold it only for his use.

In such action, a State statute limiting the time within which actions to recover excessive interest may be brought, does not apply.

D. A. Jones and J. W. & J. Ryon, for plaintiffs in error.

G. R. Kaercher, for defendant in error. "From 18 to 24 per cent," is too indefinite. *Love v. Brown*, 2 Wright, 309. Averments in affidavits of defense are to be taken most favorably for the plaintiff. *Ogden v. Offerman*, 2 Miles, 40. Jurisdiction of the question of forfeiture in this case was exclusively in the United States courts (1 Kent's Com. 401-403), and therefore the defendant could not plead set-off in a State court. *Waterman on Set-off*, 29. Congress cannot compel a State court to entertain jurisdiction. *Hintermister v. Bank*, 10 N. Y. Sup. 345; *Tiffany v. National Bank of Missouri*, 18 Wall. 410. The forfeiture is a penalty and cannot be the subject of set-off. *Bank of Chambersburg v. Commonwealth*, 2 Grant, 385. A right of action for tort cannot be assigned. *Bullard v. Raynor*, 30 N. Y. 197; *Waterman on Set-off*, 102, 148, 149, 154; *Gogel v. Jacoby*, 5 S. & R. 117; *Fairman v. Fack*, 5 Watts, 515; *Wilson v. McElroy*, 8 Casey, 82; *First National Bank of Mt. Joy v. Gish*, 22 P. F. Smith, 13.

GORDON, J. This was an action brought by the Government National Bank of Pottsville against John Lucas & Co., on two certain notes and one check, all of which were drawn by George J. Richardson

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to the defendants, and by them indorsed to the plaintiff. John Lucas, on the part of the defendants, filed an affidavit of defense, setting forth, "That the said John Lucas & Co. were the payees on the notes and check upon which suit is founded, and that George J. Richardson was the maker. That said notes and check were sold to the said plaintiff at a discount of from 18 to 24 per cent per annum, and that the defendants received from the plaintiff the amount of said notes and check, less said rate of discount. In addition to the above, said plaintiff has received from said George J. Richardson (corrected by a supplemental affidavit to read 'defendants,' instead of 'George J. Richardson'), on his (their) notes, not less than \$3,000 in excess of the legal rate of interest, the same having been purchased by the plaintiff at about the rate of 21 to 24 per cent per annum discount from the said defendants; and said defendants claim from the plaintiffs double the amount of interest under the Act of Congress." On the 7th day of July, 1873, on motion of the plaintiffs' counsel, the court entered judgment against the defendants for the whole amount of the plaintiffs' claim, with interest from and after the maturity of the paper, striking out and disallowing, however, 18 per cent, the amount of discount. This judgment is erroneous in that it includes interest on the paper in suit from the time it fell due. The Act of Congress speaks in this wise: "And knowingly taking, receiving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." Rev. Stat., § 5198.

Observe, it is the entire interest which the bill or note carries with it that is forfeited, and not merely that which the party borrowing may agree to pay. The illegal act destroys the interest-bearing power of the obligation, and as there can be no point in the history of such paper at which it is freed from the taint of illegality, so it follows there can be no point of time from which it can bear interest. The plaintiff was entitled to recover the face of the note and check, and no more. *Brown v. Second National Bank of Erie*, 22 P. F. Smith, 209.

Technically, the latter part of the affidavit of defense is bad, for it claims, as a set-off, that which the Act of Congress imposes as a penalty on the usurious transaction, to wit, double the amount of the interest paid. In this, defendants had no such interest as would enable them to use it by way of defalcation, for it could be acquired only through an action of debt under the statute; and until the forfeiture was pronounced in their favor, by judgment of the court, they had nothing therein which would be the subject of set-off. But, as we hold that the defendants

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are entitled to defalk the amount of the usurious discounts, which they paid the plaintiffs on previous transactions, we are disposed to treat the affidavit as faulty only in form, rather than substance. The money paid to the plaintiff, over and above that which the Act of Congress authorized it to receive, belonged to the defendants, and the bank could hold it only for their use. This very point was raised and decided in *Thomas v. Shoemaker*, 6 W. & S. 179. That case ruled that usurious interest paid might be recovered back in an action for money had and received, and that it was not questionable, but that such interest secured on previous transactions might be defalked against the plaintiff's claim in the suit then pending. This decision was made under the Act of 1823, then in force, by which, where more than legal interest was received, the money or other things lent was wholly forfeited.

The reason lying at the foundation of this and all similar decisions is very obvious. The receiving of such excessive interest is treated by the supreme power in the State as a public evil, and as such prohibited; consequently, when taken against the statutory prohibition, it is acquired without right, and no title thereto vests in the taker. In such case he is to be held as one wrongfully in possession of his neighbor's property.

This reason applies *à fortiori* to the case in hand, for these national banks are the mere creatures of the Act of Congress. From it they derive all the powers they possess; when, therefore, they act contrary to its express provisions and mandates, they usurp powers that do not belong to them, and such act is clearly *ultra vires* and void. In the case now in hand, if the affidavit of John Lucas be true, this bank has taken from the defendants some \$3,000, which the Act of Congress has not only, in express terms, declared it should not take, but imposed a penalty upon it for taking.

By no right, then, does the plaintiff hold this money; it has no property therein, and its possession thereof is but that of a trustee or bailee of the defendants.

Another error into which the court fell was in supposing that the case came within the provision of our Act of March 28th, 1858, which provides, that where the debt and excessive interest have been paid, no action to recover back such excess can be maintained but within six months after such payment. But this case does not come under that act, but, as we have seen, under the Act of Congress, which operates upon a subject of its own creation, and over which it has supreme control; hence our act cannot be made to supplement the national statute with a limitation not found in it. As the only limitation found in the Act of Congress applies alone to the action for the penalty, it follows

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that the claim of the defendants can only be barred by a failure to sue for the same within the period of six years after it accrued.

The judgment is reversed and a procedendo awarded.

HANNA HOLTON.

(78 Penn. St. 334.)

Debtor and — creditor collateral security — loss of, through neglect of creditor — Statute of limitations.

Where a creditor holds a collateral security for the protection of his debt, and the collateral is lost by the insolvency of the debtor in the collateral instrument through the negligence of the creditor, the latter is liable for the loss to his own debtor.

Plaintiff assigned to defendant, as collateral for money lent, a judgment the lien of which expired September, 1873. The defendant neglected to revive his lien, and the judgment debtor sold his land in 1866, and the judgment was lost. *Held*, (1) that the defendant was liable to plaintiff for the judgment, and (2) that (the judgment debtor being solvent when his land was sold) the Statute of Limitation began to run from the time of the sale and not from the expiration of the lien.

ACTION on the case by Holton against Hanna to recover damages for negligence in not reviving and continuing the lien of a judgment against one Jackson in favor of the plaintiff which had been assigned to the defendant as collateral security for money borrowed by the plaintiff from him.

The defendant pleaded "not guilty" and the Statute of Limitations.

On the 19th of March, 1858, Jackson A. Holton executed to the plaintiff a bond with warrant of attorney to confess judgment for \$1,000, payable in five years with interest; judgment on this bond was entered by virtue of the warrant of attorney on the 27th of September, 1858; it was the first lien and well secured on a farm belonging to Jackson A. Holton. On the 22d of October, 1860, the plaintiff borrowed from the defendant \$550, for which he gave his bond payable on the 25th day of the next March, and assigned as collateral security, the bond and judgment above mentioned against Jackson A. Holton, the judgment being marked on the record for the use of the defendant as collateral security for the debt of plaintiff to defendant. On the 27th of September, 1863, the lien of the plaintiff's judgment against Jackson A. Holton expired, and was not afterward revived. On the 14th of July, 1866, Jackson A. Holton sold his farm, which was all the real estate that he owned; he received all the purchase-money, and the bond to the plaintiff remained unpaid. Jackson A. Holton died insolvent on the 8th of January, 1867, and the bond of the plaintiff against him was entirely lost.

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These facts appeared on the trial November 14th, 1871, before BUTLER, P. J.

The defendant's points were :—

1. The Statute of Limitations bars the plaintiff's recovery.
2. It was not the duty of the defendant to pursue Jackson A. Holton for the collection of the bond assigned as collateral security, or of the judgment entered upon it.

3. It was not the duty of the defendant to cause the lien of the judgment, marked to his use as collateral security, to be revived.

4. The plaintiff having obligated himself to pay the defendant the \$550 bond, nearly two years before the \$1,000 bond assigned as collateral security was payable or could be collected, and two years and a half before the lien of the judgment entered upon it had expired, and having neglected to pay the \$550 bond, he was in default to the defendant, and there was no further duty on the defendant to the plaintiff with reference to said assigned bond or to said judgment.

The court answered the points as follows :

“ We cannot charge the jury as requested by the first point — that ‘ the Statute of Limitations bars the plaintiff's recovery.’

“ We think it does not. We do not regard the neglect to revive the lien at the expiration of the first five years as the cause of action, but the continued neglect of the judgment thereafter, which resulted in its loss.

The negligence commenced at the period indicated, and continued up to the time the land was sold, at least.

“ The redress sought is not for the loss of the lien, in 1863, but for the loss of the value of the judgment. The latter loss was not sustained when the lien first expired ; nor until the land was parted with and the debtor had become insolvent, years after. If the judgment had been re-assigned upon the expiration of the lien, and the plaintiff, lying still until the sale of the land and insolvency of the debtor, had brought suit in 1866, for the loss of his property, basing his claim upon the original neglect to revive, he certainly would have been answered that the loss did not result from this, but from subsequent negligence of his own ; and it would have been conclusive. If an action had been brought upon the expiration of the lien, the complaint could not have been what it now is — negligence, whereby the value of the judgment was lost. It must have been negligence by which one of its incidents merely (the lien) was lost ; and as this could then have been readily restored, and the plaintiff placed where he was before, the damages, if any, must have been virtually nominal.

“The question raised by the point is, however, a very interesting one, and we regret that the time afforded us will allow of no more than this very brief indication of the ground on which we dispose of it.

“The remaining points are also disaffirmed. We will not say that it was the duty of the defendant, under the circumstances shown here, to issue execution for the collection of the judgment, so long as its lien continued on the land; but we think it was his duty to take care that the lien continued; that the hold upon the land was preserved; and that the judgment did not, while in his hands, become less secure, or less valuable, by reason of any omission of his.”

W. B. Waddell and *P. F. Smith* (with whom was *G. F. Smith*), for plaintiff in error. The bond and judgment being assigned, not for collection but as collateral, the defendant incurred no responsibility but from positively detrimental acts. *United States v. Simpson*, 8 Penn. 437; *Mundorff v. Singer*, 5 Watts, 172; *Morrison v. Hartman*, 2 Harris, 55; *Bank United States v. Peabody*, 8 id. 454. As to the Statute of Limitations, the cause of action accrued when the negligence occurred, irrespective of the time when the consequential loss accrued. *Miller v. Wilson*, 12 Harris, 114; *Wilcox v. Plummer*, 4 Peters, 172; *Howell v. Young*, 5 B. & C. 259; *Frank v. Smith*, 16 P. F. Smith, 27; *Rhines v. Evans*, id. 192; *Crawford v. Gaulden*, 33 Ga. 173; *Stephens v. Downey*, 8 P. F. Smith, 424.

W. McVeagh and *J. J. Lewis*, for defendant in error. The transfer of Jackson A. Holton's bond as collateral put it wholly, for the purposes of care, protection, etc., in the hands of the defendant; and the plaintiff had no right to exercise any control over it. Whilst the defendant below held the collateral security, his duties toward it were active and he was bound to use due diligence in regard to it. If, at the termination of any bailment, the collateral security was less valuable by reason of the negligent conduct of the defendant while it was in his hands as collateral security, an action for the loss accrued to the plaintiff against the defendant. *Lyon v. Huntingdon Bank*, 12 S. & R. 68; *Lishy v. O'Brien*, 4 Watts, 141; *Beale v. The Bank*, 5 id. 529; *Miller v. The Gettysburg Bank*, 8 id. 192; *Dyott's Estate*, 2 W. & S. 490; *Mullen v. Morris*, 2 Barr, 85; *Spalding v. The Bank*, 9 id. 28; *Insurance Co. v. Smith*, 1 Jones, 120; *Sellers & Nichols v. Jones*, 10 Harris, 427; *Williamson v. McClure*, 1 Wright, 410; *Insurance Co. v. Marr*, 10 id. 507; *Russell v. Heister*, 10 Ala. 535; *Cardin v. Jones*, 23 Ga. 175; *Slevin v. Morrow*, 4 Ind. 425; *Noland v. Clark*, 10 B. Monr. 239; *Bank v. Martin*, 1 La.

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Ann. 840 ; *Jennison v. Parker*, 7 Mich. 355. As to the Statute of Limitations, no right of action accrued till July 14th, 1866, when J. A. Holton sold his land ; for until then there was no loss to the plaintiff. The duty of conducting the litigation is an entire duty, extending from its beginning to its close, and any action concerning it, whether for liability for negligence in conducting it, may await its conclusion without danger from the Statute of Limitations, unless the negligence is sooner known. *Foster v. Jack*, 4 Watts, 389 ; *Derrickson v. Cady*, 7 Barr, 27 ; *Lichty v. Hugus*, 5 P. F. Smith, 484 ; *Overton v. Tracey*, 14 S. & R. 311 ; *Leinhart v. Forringer*, 1 Penn. 492 ; *Jones v. Trimble*, 3 Rawle, 381 ; *Poe v. Foster*, 4 W. & S. 351 ; *Lytle v. Mehaffy*, 8 Watts, 267 ; *Vanhorn v. Scott*, 4 Casey, 316 ; *Evans v. See*, 11 Harris, 88 ; *Bank v. Waterman*, 26 Conn. 324 ; *Insurance Co. v. Marr*, 10 Wright, 504 ; *Newbert v. Cunningham*, 50 Me. 231 ; *Hanock v. Wilhoite*, 1 Duvall, 313 ; *Polly v. McCall*, 37 Ala. 20 ; *Keefer v. Zimmerman*, 22 Md. 274 ; *Norton v. Hall*, 41 Vt. 471 ; *Bottom v. Williamson*, 3 Bush, 521 ; *Singleton v. Townsend*, 45 Mo. 379 ; Angell on Lim., § 173.

AGNEW J. The cases cited for the plaintiff in error are chiefly those of sureties where the indulgence of the creditor was purely permissive, and the surety was, therefore, held not to be discharged. A creditor who holds a collateral security for the protection of his debt stands in a different relation to the assignor of the collateral, though the latter be his debtor. By the assignment a privity in contract is established, which invests the assignee with the ownership of the collateral, for all purposes of dominion over the debt assigned. He alone is empowered to receive the money to be paid upon it, and to control it in order to protect his right under the assignment. This is the ground of the creditor's liability for the collateral, as stated by TILGHMAN, C. J., in *Lyon v. Huntingdon Bank*, 12 S. & R. 68 ; and also by the court in *Beale v. The Bank*, 5 Watts, 530. It is therefore settled in this State that where the collateral is lost by the insolvency of the debtor in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor, who invested him with its entire control. *Miller v. Gettysburg Bank*, 8 Watts, 192 ; *Bank United States v. Peabody*, 8 Harris, 454 ; *Dyott's Estate*, 2 W. & S. 490 ; *Chambersburg Ins. Co. v. Smith*, 1 Jones, 120 ; *Sellers et al. v. Jones*, 10 Harris, 427 ; *Lisby v. O'Brien*, 4 Watts, 141 ; *Muirhead v. Kirkpatrick*, 9 Harris, 287 ; *Ins. Co. v. Marr*, 10 Wright, 504. We perceive no error, therefore, in the decision of the court below, that William Hanna must account to Alexander Holton for the loss of the assignment against Jackson A. Holton, by reason of his omitting to keep up its lien,

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and afterward failing to proceed to collect it, until Jackson became insolvent.

This action is not founded on the loss of lien alone. That is but a circumstance or one of the facts constituting negligence. Had the failure to revive the judgment been the only cause of the loss of the debt, as under some circumstances it might be, the six years having then elapsed before suit, the Statute of Limitations would have been a bar. But the loss of the lien was not in this instance the sole cause of the loss of the debt. Jackson A. Holton continued solvent, and the judgment remained collectible until 1866, when Jackson sold his property, and actually received a large part of the purchase-money himself. Alexander Holton's debt to Hanna was contracted in October, 1860, and he then assigned to Hanna the judgment against Jackson A. Holton as collateral security. The lien of the judgment expired in September, 1863; Jackson sold his farm in July, 1866, and died insolvent in 1867; Hanna in the meantime taking no step to secure or to collect the judgment, which all this time stood marked to his use on the docket. It is very clear that the real injury to Alexander Holton was not consummated until Jackson sold his farm, and put the proceeds in his pocket. The cause of action then arose, and the statute then began to run. At least this was the earliest period it could arise, and this was only four years before the commencement of the action. The statute was no bar, therefore, and the judgment is therefore affirmed.

On the reargument, the judgment was affirmed for the reasons in the foregoing opinion.

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(78 Penn. St. 407.)

Insanity — when a defense to contracts — when inquest no defense to prior transaction.

Defendant desiring to borrow money gave S. his note, which S. procured to be discounted at plaintiff's bank, and the money deposited to defendant's order. Afterward a petition *de lunatico inquirendo* was presented against defendant, and he was found to be a lunatic, and to have been a lunatic from a time anterior to the making of the note. The plaintiff had no notice of defendant's lunacy. *Held*, that defendant's insanity was not a defense to an action on the note. (See note, p. 29.)

ACTION of assumpsit on notes dated December 30th, 1871, made by defendant payable to the order of one Stauffer, and discounted on the day of its date by the plaintiff. Defense that defendant was a lunatic when the note was given.

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The plaintiff gave evidence by Stauffer, the payee and indorser of the note, that the defendant called on witness to borrow \$1,000. Witness and defendant went to plaintiff's bank, and at the request of witness the cashier drew the note in suit and another for \$775 ; witness indorsed them, and they were discounted by the plaintiff ; the witness gave defendant a check for the amount of the \$225 note, less the discount on both notes, and also a check for \$775, which checks were paid by the plaintiff. Witness testified that the defendant was competent to transact business at that time ; that witness had known him for a long time, and he was at that day as he always had been, and during all his acquaintance with defendant he had never seen any thing to induce him to believe that defendant was of unsound mind.

The defendant offered in evidence the record of proceedings in lunacy against Moore, commenced June 5th, 1872 ; the inquest, June 28th, found that Moore had been a lunatic for three years before the inquisition ; the inquisition was confirmed August 19th, 1872. John M. Hershey, a creditor of Moore, traversed the inquisition October 25th, 1872 ; a replication was filed December 17th, 1873. The offer was objected to by the plaintiffs, admitted by the court and a bill of exceptions sealed.

There was no evidence that at or before the discounting of the notes the plaintiff had notice of defendant's incompetency.

The verdict was for the defendant, and the plaintiff took a writ of error.

G. Nauman and *S. H. Reynolds*, for plaintiff in error. This contract was executed. *Fletcher v. Peck*, 6 Cranch, 87 ; *Smith on Contracts*, 107, 229. A defendant cannot set up his own insanity unless it were known by plaintiff. *Byles on Bills*, 47. In an executed contract the lunacy of defendant being unknown to the defendant, the lunatic cannot take advantage of it. *Molton v. Camroux*, 4 Exch. 19 ; *Niell v. Morley*, 9 Ves. 478 ; *Baxter v. Portsmouth*, 2 C. & P. 178 ; *Cook v. Parker*, 4 Phila. 267 ; *Osmond v. Fitzroy*, 3 P. Wms. 130 ; *Dane v. Kirkwall*, 8 C. & P. 679. A contract with a lunatic apparently sane cannot be rescinded unless the parties can be placed in statu quo. 1 *Parsons on Contracts*, 385 ; *LaRue v. Gilkyson*, 4 Barr, 375. The position that one *non compos mentis* cannot make a contract under any circumstances is untenable. *Beals v. See*, 10 Barr, 56 ; *Nace v. Boyer*, 6 Casey, 99 ; *State Bank v. McCoy*, 19 P. F. Smith, 204. The test of capacity given in answer to the plaintiff's second point was too strict ; it is enough if the party knows the character of the act, and its resulting responsibility. *Noel v. Karper*, 3 P. F. Smith, 97. Reports of the neighborhood

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as to defendant's state of mind were inadmissible. 1 Greenl. on Ev., § 99 ; *Wright v. Tatham*, 1 Ad. & E. 3.

H. M. North and *T. E. Franklin*, for defendant in error. The test of liability for a lunatic's contract is, whether it was for necessities ; whether the contract was executed or executory is not material. *Desilver's Estate*, 5 Rawle, 111 ; *Rogers v. Walker*, 6 Barr, 371 ; *Seaver v. Phelps*, 11 Pick. 306 ; *Clark v. Caldwell*, 6 Watts, 139 ; *Imhoff v. Witmer*, 7 Casey, 243 ; Inst. Lib. 3, tit. 20, § 8 ; Pothier on Oblig., part 1, cap. 1, § 1, arts. 1-4 ; 3 Bac. Abr. 539 ; *Yates v. Buen*, 2 Strange, 1104 ; *Gore v. Gibson*, 13 M. & W. 623 ; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 659 ; *Bensell v. Chancellor*, 5 Whart. 374. A contract of one so far deprived of his reason as to be unable to manage his affairs is not binding. *McElroy's Case*, 6 W. & S. 451 ; *Commonwealth v. Schneider*, 9 P. F. Smith, 328. The finding by the commission *de lunatico inquirendo* is *prima facie* evidence of lunacy. *Hutchinson v. Sandt*, 4 Rawle, 234 ; *Gaugwore's Appeal*, 4 Casey, 466 ; *Willis v. Willis*, 2 Jones, 159 ; *Commonwealth v. McGinnis*, 2 Whart. 113. The report in the neighborhood that the defendant was simple was competent. *Rogers v. Walker*, 6 Barr, 371.

PAXSON, J. The law is well settled that persons who are not *sui juris*, and have no general capacity to contract debts, are nevertheless liable for their torts, and may bind themselves for necessities. Such rule rests upon principles of sound public policy. To deny the latter branch of the proposition might in some instances deprive persons laboring under such disabilities of the means of subsistence. In *La Rue v. Gilkyson*, 4 Barr, 375, it was held that the executor of a lunatic was liable for necessities furnished to his testator while *non compos mentis*, and before the appointment of a committee. In that case the articles furnished came within the most rigid rule as applied to necessities, such as board, washing, etc., but Chief Justice GIBSON, who delivered the opinion of the court, cites approvingly *Baxter v. Portsmouth*, 2 C. & P. 178, in which it was held that the word " necessities " (furnished to a lunatic) " is not to be restricted to articles of the first necessity, but that it includes every thing proper for a person's condition ; and that to hire carriages for a nobleman who, though actually insane, voted in Parliament, and went about as other men do, carries with it no mark of imposition." And it was also strongly intimated that such a man would even be liable for merchandise innocently furnished to his order under such circumstances. It is true the latter point was not before the court, and the expression refer-

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red to is but *dictum*, but the mere *dictum* of so eminent a jurist as the late Chief Justice GIBSON is entitled to respect. *La Rue v. Gilkyson* was followed by *Beals v. See*, 10 Barr, 56, in which it was held that an executed contract by a merchant for the purchase of goods before the lay from which the inquest found him to have been *non compos*, could not be avoided by proof of insanity at the time of the purchase, unless there had been a fraud committed on him by the vendor, or he had knowledge of his condition. There was proof in the case cited that the goods purchased were unsuited to the object for which they were purchased; that the price agreed upon far exceeded their market value, and that plaintiff had tendered them back to the defendants who declined receiving them, whereupon they were sold at auction, after notice. Says GIBSON, C. J.: "Should he have made a wild and unthrifty purchase from a stranger unapprised of his infirmity, who is to bear the loss incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity as he is liable to bear his misfortunes, on the principle that when a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and when such a man goes into the market, makes strange purchases and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman would exclude every speculator from the transactions of commerce." It will be observed in this case that the goods were purchased two days prior to the day from which the inquest found the purchaser insane, and the transaction was not, therefore, covered by the finding. But the court do not rest their decision upon this ground, but treat it as the purchase of an insane man — insane at the time of the purchase. Such was evidently the view taken of the case in *Nace v. Boyer*, 6 Casey, 99, in which the late Chief Justice WOODWARD says: "In *Beals v. See*, 10 Barr, 56, this court held that an executed contract by a merchant for the purchase of goods could not be avoided by proof of *insanity at the time of the purchase*, unless a fraud was committed on him by the vendor, or he had knowledge of his condition." The principles decided in *La Rue v. Gilkyson* and *Beals v. See* are recognized in *State Bank v. McCoy*, 19 P. F. Smith, 204; S. C., 8 Am. Rep. 246.

We will apply these principles to the facts of this case. George H. Moore, the defendant and alleged lunatic, resided in Lancaster county, about six miles from Lancaster city, where the plaintiff's corporation is located. He was a man of some property, was about fifty-four years of

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age, and to some extent, at least, had managed his own pecuniary affairs. There was not a scintilla of proof that the bank had any knowledge of his mental imbecility. On December 30th, 1871, he called at plaintiff's bank, in company with B. M. Stauffer, a resident of Mount Joy, Lancaster county, for the purpose of obtaining a discount, when two notes were drawn up, one for \$225 and the other for \$775, signed by the said George H. Moore, to the order of Stauffer, and by him indorsed. The two notes were both discounted, and the money placed to the credit of Moore and checked out by him. There is no allegation that the money thus obtained was used improvidently; in fact the evidence tends to show that it was applied to the payment of his debts. Nor was there any thing in his manner or conversation to put the officers of the bank on their guard as to his mental condition. On June 5th, 1872, a petition *de lunatico inquirendo* was presented against George H. Moore, and after the usual proceedings, an inquisition was returned on August 10th, 1872, finding that the said Moore was a lunatic, and had been so for about three years last past, and had no lucid intervals. This inquisition was traversed on October 25th, 1872, by John M. Hershey, a creditor. Said traverse was pending at the time of the trial in the court below.

In *Beals v. See*, as before observed, the day when the goods were sold was not covered by finding of the inquest. Here the inquisition shows Moore to have been a lunatic at the time the note was made and discounted by the bank. The record of the proceedings in lunacy was admitted in evidence at the trial in the court below, and was undoubtedly *prima facie* evidence of Moore's insanity. But we are unable to see how this affects the case. *Beals v. See* was decided upon the express ground that the merchant was liable, notwithstanding his insanity, upon an executed parol contract, in the absence of fraud in the transaction, and of knowledge on the part of the vendor of his insanity. The most that the inquisition amounted to was to establish a *prima facie* case of insanity when the contract was made. But the broad principle decided in *Beals v. See* was, that the insanity, when established, was not, under the circumstances, a defense.

The soundness of this rule is too apparent to need any extended vindication. Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with a particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversa-

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tion the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price. Here the bank in good faith loaned the defendant the money on his note; the contract was executed so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate.

It will be seen that the fact that the bank had no notice of the defendant's insanity is an important element in the case. The proceedings in lunacy were not commenced until after the note was discounted, and the plaintiffs were not even affected with constructive notice. We limit our decision in this case to its own facts, and do not decide the case of a contract made during proceedings in lunacy or after inquisition found. We leave the effect of *lis pendens* in such a case until the point is raised. Nor does this decision apply to conveyances of land or instruments under seal.

From what has been said it will be seen that the learned judge erred in his answer to the plaintiff's first point. Said point should have been affirmed in the terms in which it was presented.

There was also error in that portion of his charge referred to in the seventh assignment of error. The jury should have been instructed that if there was no fraud in the transaction, and the bank had no notice of the defendant's insanity, the verdict should be for the plaintiffs.

There was also error in the admission of the evidence referred to in the third assignment. It is true its admission would seem to be sustained by the dictum in *Rogers v. Walker*, 6 Barr, 375. But the point did not arise in that case, and the remark referred to was evidently used by way of illustration. We are unable to see how the neighborhood reports of Moore's insanity could possibly have been legitimate evidence in this case. If offered to affect the bank with notice of his insanity, it was not competent, for the reason that the reports were not brought home to the bank. If offered to prove the distinct fact of Moore's insanity it was clearly inadmissible. It was at best mere hearsay, and no amount of such evidence could legally establish such fact.

Judgment reversed and a venire facias de novo awarded.

NOTE.—See *Miller v. Finley*, 12 Am. Rep. 306; S. C., 26 Mich. 249, wherein it was held that the drunkenness of the maker of a promissory note was not a defense to an action on the note in the absence of proof of fraud or of his absolute incapacity. See also note to *State Bank v. McCoy*, 8 Am. Rep. 246; *Young v. Stevens*, 2 id. 202.

In *Van Deusen v. Sweet*, 51 N. Y. 378, the Commission of Appeals held that a deed executed by one *non compos mentis* — which the court in that case defined to mean “totally and positively incompetent” — is absolutely void; and that where a defendant in an ac

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tion to recover the possession of real property claims under such a deed, the fact of the incapacity of the grantor may be shown by plaintiff to defeat such claim, although no fraud is alleged and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed. The court further held that an inquisition under a writ *de lunatico inquirendo*, stating that at the time of the execution of a deed the grantor was *non compos mentis*, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under the deed.

In *Banker v. Banker*, 63 N. Y. 409, which was an action by the heir and next of kin of John Banker, deceased, to annul a marriage between the deceased and the defendant on the ground that the deceased was *non compos mentis* at the time of the marriage ceremony, it appeared that two days after the marriage an inquisition was found declaring that the said John Banker was at the time of unsound mind, and that he had been so for six months prior thereto. The court held, following *Van Deusen v. Sweet*, *supra*, that the inquisition was only presumptive evidence of incapacity, and that the fact that proceedings under a writ *de lunatico inquirendo* were pending at the time of the marriage, and that the defendant had knowledge of the fact, did not affect the question. In that case the court below found as a fact that John Banker was of sound mind when the marriage took place. In *L' Amoreux v. Crosby*, 2 Paige, 422, the chancellor stated very clearly and accurately the principles adjudicated in this State as to the effect of an inquisition of lunacy. Among other things he said: "As to acts done by a lunatic or drunkard, before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. But all gifts of the goods and chattels of the idiot, lunatic or drunkard, and all bonds or other contracts made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted to assume the control of his property by the court, are utterly void." See, also, *Osterhout v. Shoemaker*, 3 Hill, 516; *Hart v. Durmer*, 6 Wend. 497; *Hoyt v. Adea*, 3 Lans. 173; *Goodell v. Harrington*, 3 T. & C. 345; *Demelt v. Leonard*, 19 How. 141. The rule is stated to be that inquisitions are admissible in evidence, but that they are not conclusive except against the parties immediately concerned and their privies. *Hoyt v. Adea*, 3 Lans. 173; *Goodell v. Harrington*, 3 T. & C. 345.

After one has by inquisition been found an habitual drunkard, he cannot, until it is vacated or a commission thereon superseded, even in his sober intervals, make contracts to bind himself or property. *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Leonard v. Leonard*, 14 Pick. 280.

But he may make a will. *Lewis v. Jones*, 50 Barb. 645; *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115; *Whitmarsh v. Stryker*, 1 Green's Ch. (N. J.) 8. The opinion of FOSTER, J., in *Lewis v. Jones*, *supra*, contains a learned and valuable analysis and examination of the cases.

In *Mattheissen v. McMahon* 38 N. J. L., 536, the Court of Errors and Appeals of New Jersey held that the general rule is, that contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic, for a full consideration, which has been executed without knowledge of the insanity, or such information as would lead a prudent person to the belief of the incapacity, will be sustained; that the after-occurring insanity of a principal operates, *per se*, as a revocation or suspension of the powers of his agent, except in cases where a consideration has been previously advanced in the transaction so that the power became coupled with an interest, or where a consideration of value is given by a third person dealing with the agent, relying on his apparent authority in ignorance of the principal's incapacity. That was an action to recover goods, and the defendant claimed title under a sale and delivery by plaintiff's intestate. DEPUE, J., noting the third exception, said: Exception was taken to the charge of the court as to the effect of the insanity of a contracting party on his contracts.

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The goods, in fact, were delivered into the possession of the defendants by Shaudley, the superintendent of McMahon's business. The effect of this delivery was met by the plaintiff by testimony that McMahon was incapable of transacting business during the time of the delivery, by reason of insanity. There was evidence that the deceased exhibited symptoms of a disordered intellect as early as the commencement of the delivery of the goods, which continued until his death.

The judge having charged that there was no evidence of part payment, to make the contract good within the statute of frauds, and that its validity was dependent on a delivery and acceptance of the goods sold, or of some part thereof, submitted as the question for the jury whether McMahon was competent to make the bargain, and if so, whether his competency continued so as to enable him to complete and perfect the bargain by delivery. This presentation of the question, as well as the instruction that the burden of proving the mental incapacity of the deceased, was on the plaintiff, and that the plaintiff must satisfy the minds of the jury, by the proof he adduces of that fact, were correct.

The instruction was, that the contracts of lunatics and insane persons were invalid, and not binding, with a qualification that if Mattheissen, acting as the agent of the company, was dealing with McMahon or his agent in the ordinary course of business, in good faith, without any knowledge of the insanity or mental disturbance of McMahon, and without the knowledge of such circumstances as would put a reasonably prudent man upon inquiry, made the bargain in good faith, then that would be a good bargain, and neither McMahon nor his representative could set up the insanity against it. Exception was taken to the refusal of the judge to add a direction that nothing but imposition on an insane person will avoid his contract.

The instruction as given is in accord with the principle established by the modern English cases and the decisions of our courts, as the general rule in dealing with the contracts of lunatics. *Yauger v. Skinner*, 1 McCarter, 389; *Eaton v. Eaton*, 8 Vroom, 108; *Molton v. Camroux*, 2 Exch. 487; S. C., 4 id. 17; *Beavan v. McDonald*, 9 id. 309; *Elliott v. Ince*, 7 DeG., M. & G. 475.

There is a class of cases such as *Baxter v. Earl of Portsmouth*, 2 C. & P. 178, in which imposition upon a lunatic — advantage taken of his mental infirmity — is held to be an essential ingredient of the defense. But these are cases of contracts for necessities — contracts which lunatics, known to be such, are capable of entering into, and are exceptions to the general rule. Other contracts with lunatics not strictly for necessities, which have been fully executed, and on which a consideration of benefit to the lunatic has been given, may be within the reason of this exception, where the transaction is shown to be perfectly fair and reasonable, at least, so far as to allow the recovery back of the consideration given, or to prevent a rescission by the lunatic or his representatives, without restoring the consideration, whenever a restoration is practicable. The liability of the lunatic in such cases is upheld not on the ground of the contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract. This view is advanced by POLLOCK, C. B., in *Gore v. Gibson*, 13 M. & W. 628, and by REDFIELD, C. J., in *Lincoln v. Buckmaster*, 32 Vt. 658. On this principle, *Brown v. Jodrell*, 3 C. & P. 30; *Dane v. Kirkwall*, 8 id. 675; *Niell v. Morley*, 9 Vesey, 478; *Selby v. Jackson*, 6 Beavan, 192; and the observations of SHAW, C. J., in *Arnold v. Richmond Iron Works*, 1 Gray, 434, may be reconciled with the other cases.

In *Eaton v. Eaton*, the court treated the effect of the consideration given as overcome by proof of imposition and actual fraud in obtaining the conveyance. But this case is not within any of these exceptions. The defendants did not part with any money or consideration of value under this contract. They proposed merely a credit of the contract price on an existing indebtedness, which was rendered nugatory by the operation of the statute of frauds.

The general rule, which must govern this case, is, that absence of knowledge of the insanity of the party, as well as fairness in other respects, must concur to give validity

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to a contract with a lunatic. Knowledge or information, such as would lead a prudent person to the belief of the incapacity, is such evidence of bad faith as will avoid the contract. *Lincoln v. Buckmaster*, 32 Vt. 652. In *Yauger v. Skinner*, the rule is stated by Chancellor GREEN to be, "that if the proof be clear that an executory contract to purchase was made in good faith, and for a full, fair price, when the lunacy of the vendor was neither known nor suspected, and that the contract was executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, the contract will be upheld." In *Elliott v. Ince*, Lord CRANWORTH states the result of the authorities to be, "that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those *who have dealt with him on the faith of his being a person of competent understanding*." In *Price v. Berrington*, 7 Hare, 402, Vice-Chancellor SHADWELL says: "I do not understand it to be denied, that if the party treating with the lunatic knew of the lunacy, that is a fraud." In *Molton v. Camroux*, as reported in 2 Exch. 501, POLLOCK, C. B., says: "The rule, as laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind would now be a good defense, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it." In *Beavan v. McDonell*, 9 Exch. 309, the action was by a lunatic to recover back a deposit made on a contract to purchase lands. To a plea alleging receipt of the money under the contract, the plaintiff replied, that when the contract was made, and money paid, he was a lunatic and incapable of contracting, and that the contract was not of any benefit to him, and averred that the defendant, at the time, etc., had notice. The defendant rejoined that neither the vendors nor the defendant when the plaintiff made the contract, or paid the money, "knew that he was a lunatic, or of unsound mind, and incapable, by reason of unsoundness, of understanding the meaning of a contract, but made the said contract with him fairly and in good faith, believing that he was able to understand the same." In none of the pleadings was any allusion made to imposition or advantage taken of the lunatic in the bargain. The defense was made solely on the ground of unsoundness of mind and knowledge of that fact by the opposite party; and by the rejoinder, an issue was tendered on the averment of knowledge. On demurrer to the rejoinder the pleadings were held to be good. The case was afterward tried on that issue, and resulted in a verdict for the plaintiff, which was sustained, as appears by the report of the case in 10 Exch. 183.

In *Gore v. Gibson*, 13 M. & W. 623, to an action against an indorser of a bill of exchange the defendant pleaded that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding and the use of his reason as to be unable to comprehend the meaning, nature or effect of the indorsement, or to contract thereby, of which the plaintiff, at the time of the indorsement, had notice. On demurrer it was contended that the plea, to be good, should have averred that the intoxication was procured by the plaintiff, or that he took advantage of it. The court nevertheless held the plea to be good. In *Matthews v. Baxter*, L. R., 8 Exch. 132, the plea was in the same form.

The instruction given without the addition prayed for was as favorable to the defendants as the facts would warrant.

The instruction that the agency of Shandly was revoked by the insanity of his principal, as qualified by the passage above quoted, was correct."

Notwithstanding the declaration of Chancellor KENT (2 Kent, 645), "that the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition, before it could control the operation of the power," the weight of authority, as well as sound reasoning, led to the conclusion that the after-occurring insanity of the principal operates, *per se*, as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency, so that the power became coupled with an interest; or where a consideration of value is given by a third

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person, trusting to an apparent authority in ignorance of the principal's incapacity. Story on Agency, § 481 ; *Bunce v. Gallagher*, 5 Blatchf. C. C. 481 ; *Davis v. Lane*, 10 N. H. 156. Justice STORY states the principle to be that "as the party himself, during his insanity, could not personally do a valid act, his agent cannot, in virtue of a derivative authority, do an act for and in his name, which he could not lawfully do for himself." From this principle the conclusion inevitably results, that transactions of third parties, which, under the circumstances, would be invalid if had directly with the principal, must be equally invalid though they be done with the agent. Saving the rights of persons who, before the insanity intervened, became interested in the power by reason of a consideration advanced, or who, in ignorance of the incapacity, in good faith parted with a consideration of value, relying on the apparent authority of the agent, complete justice will be done, and the law on this subject be made to harmonize.

In *Murray v. Carlin*, 67 Ill. 286, it was decided that the settlement of a cause of action made when one of the parties was so intoxicated as to be incapacitated would not be conclusive on the latter.

In *Dexter v. Hall*, 15 Wall. 9, it was held, after a learned examination of the cases, that a power of attorney to sell lands made by a lunatic is void, not merely voidable. See *contra*, *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236 ; *Hovey v. Hobson*, 53 Me. 451 ; *Cates v. Woodson*, 2 Dana (Ky.), 452 ; *Somers v. Pumphrey*, 24 Ind. 231.

Where goods are sold to a person apparently of sound mind, who is not known by the seller to be otherwise, and who has not been found to be otherwise by a proper proceeding for that purpose, and the contract is fair and *bona fide*, and the purchaser receives and uses the goods, whereby the contract becomes so far executed that the parties cannot be placed *in statu quo*, such contract cannot afterward be set aside because of the unsoundness of mind of said purchaser at the time of the sale, nor can payment for the goods be refused, either by the alleged lunatic or his representatives. *Wilder v. Weakley*, 34 Ind. 181. So where a person subject to temporary insanity sold, during a lucid interval, property for a full price for the payment of urgent debts and with the knowledge of his friends, he was held not to be entitled to have the sale set aside. *Jones v. Perkins*, 5 B. Monr. 222.

A judgment obtained against a person subsequently found to be of unsound mind may be revived against him and his committee. *McNees v. Thompson*, 5 Bush, 686. But see 47 Me. 548.

Contracts with lunatics are not all absolutely void ; but such as are fairly made with them for necessities or things suitable to their condition and habits of life will be sustained. *Richardson v. Strong*, 13 Ired. 106 ; *Ex parte Northington*, 1 Ala. Sel. Cas. 400 ; *Skidmore v. Romaine*, 2 Bradf. 122 ; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658 ; and where one enters into a contract with a lunatic without knowledge of his lunacy or renders him important services, thereby greatly benefiting him, a court of equity will award him reasonable compensation. *Ballard v. McKenna*, 4 Rich. (S. C.) Eq. 358. But it is otherwise if the services prove of no benefit to the lunatic. *Lincoln v. Buckmaster*, 32 Vt. 652. A contract entered into during a lucid interval is valid. *Lilly v. Waggoner*, 27 Ill. 395.

Tender of payment of the consideration is not necessary to rescind a sale made by a person who was *non compos mentis* at the time thereof. *Henry v. Fine*, 23 Ark. 417.

Where the contract of a lunatic or drunkard is in question and the fact of lunacy or drunkenness is established by other means than a legal inquisition, it is always competent for the party alleging the contract to prove a lucid interval. *Tozer v. Saturlee*, 3 Grant's (Pa.) Cas. 162.

In the case of *Allore v. Jewell*, 16 Alb. L. J. 17, recently decided by the Supreme Court of the United States, the court held that whenever there is great weakness of mind arising from age, sickness, or any other cause in a person executing a conveyance of land, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and

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seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. The action here was brought by the heir at law of Marie Genevieve Thibault, late of Detroit, Michigan, to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when from her condition she was incapable of understanding the nature and effect of the transaction. The conveyance was of a quantity of land in Detroit worth from six to eight thousand dollars for the consideration of two hundred and fifty dollars cash and an annuity of five hundred dollars during the life of the grantor and payment of her physician's bills and the use of the house thereon, or the rent of such other house as she might occupy. At the time the conveyance was made the grantor lived alone in great degradation, and was in a condition of mind bordering on the line between sanity and insanity. A number of suspicious circumstances accompanied the transaction and only the grantee and his agent and attorney were shown to be present at the time it took place. The court below refused a decree setting aside the deed complained of. In reversing this decision the Supreme Court said: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of *Harding v. Wheaton*, reported in the 2d of Mason, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was after his death set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes." "Extreme weakness," said Mr. Justice STORY in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." The case subsequently came before this court, and in deciding it, Mr. Chief Justice MARSHALL, speaking of this and, it would seem, of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles." *Harding v. Handy*, 11 Wheat. 125.

The same doctrine is announced in adjudged cases almost without number; and it may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

In the recent case of *Kempson v. Ashbee*, decided in the Court of Appeal in Chancery in England, two bonds executed by a young woman, living at the time with her mother and step-father, — one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond — were set aside as against her, on the ground that she had acted in the transaction without independent advice, one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter

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into transactions without advice of that kind. The principle upon which the court acts in such cases, protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground, as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity ; and that a cancellation of the deed should be decreed."

Where a contract is impeached solely on the ground of incapacity of one of the parties to it and without charge of fraud, the test of capacity is the ability of such party to comprehend in a reasonable manner the nature of the particular transaction. Proof of delusion in independent subjects is not enough. *Sozeur v. Shields*, 23 N. J. Eq. 509 ; and see *Hull v. Unger*, 2 Abb. U. S. 507. Absolute soundness of mind is not necessary to enable one to make a valid conveyance. It is sufficient if the mind fully comprehend the import of the particular act. *Hovey v. Hobson*, 55 Me. 256 ; *Miller v. Craig*, 86 Ill. 109 ; *Speers v. Sewell*, 4 Bush, 239 ; *Dennett v. Dennett*, 44 N. H. 531 ; *Rippy v. Gaunt*, 4 Ired. 443.—REP.

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(78 Penn. St. 507.)

Conflict of laws — assignments — lex loci contractus.

An assignment was made in New York, of a chose in action which, by the law of that State, vested the legal title and the right of action at law in the assignee. *Held*, that the latter might sue in his own name in Pennsylvania, although he could not have done so if the assignment had been made there.

ACTION of assumpsit by A. Levy and another against Simon Levy to recover the amount of three claims, two of which had been assigned to plaintiffs in New York and the third of which was due themselves. The defendants filed an affidavit of defense, denying plaintiffs right to sue on the assigned claims, and alleging payment of the other.

A rule was taken by the plaintiffs for judgment for want of a sufficient affidavit of defense.

After argument, PEARSON, P. J., held the affidavit sufficient and discharged the rule for judgment.

The plaintiffs took a writ of error and assigned the discharging of of their rule for error.

J. W. Simonton, for plaintiffs in error. Under section 111 of their Code, the New York courts hold that the assignee of a chose in action holding the legal title by written assignment valid on its face, is the real party in interest, though others may have a beneficial interest with him in the proceeds. *Allen v. Brown*, 44 N. Y. 228 ; *Meeker v. Claghorn*, id. 349 ; *Hooker v. Eagle Bank*, 30 id. 87 ; *Byxbie v. Wood*, 24 id. 607. The law of maintenance prohibited the

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transfer of the legal property in a chose in action so as to enable the assignee to sue in his own name; but this has been abrogated. *Petersen v. Chemical Bank*, 82 N. Y. 45. A legal title cannot exist in assignor and assignee both. *Pryor v. Wood*, 7 Casey, 149. By the assignment of the choses in action in this case made in New York under the laws of that State, the legal title passed to the assignees, and the suit *here* must be in their name. *Thompson v. Bell*, 3 E. & B. 236; *Vanquelin v. Bo-ward*, 15 C. B. (N. S.) 841; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Bradlaugh v. DeSin*, Law Rep., 3 Com. B. 478 (1868); Story on Conflict of Laws, §§ 242, 816, 853, 854, 858, 859.

A. H. Weiss and *R. A. Lamberton*, for defendant in error. The mode of suing is governed by the *lex fori*. *Trimbey v. Vignier*, 1 Bing. N. C. 151; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Robinson v. Bland*, 4 Burrow, 1084; *Down v. Lippmann*, 5 Cl. & Fin. 1; *Fergusson v. Fyffe*, 8 id. 121; *Wilcox v. Hunt*, 18 Pet. 378; *Bank United States v. Jones*, 8 id. 361; *Andrews v. Herriott*, 4 Cow. 508; *Pearsall v. Dwight*, 2 Mass. 84; *Wood v. Watkinson*, 17 Conn. 510; *Speed v. May*, 5 Harris, 95; *Watson v. Brewster*, 1 Barr, 381. The inquiry in whose name the suit is brought relates more to form of remedy than to the merits. Story's Conf. of Laws, § 565; Wharton's Conf. of Laws, § 735. Under statutes similar to section 111 of New York Code, it is held, the law of the forum must govern. *Foss v. Nutting*, 14 Gray, 485; 2 Parsons on Notes, etc., 47, note *c*; *MacDonald v. Kneeland*, 5 Minn. 365; *Fisk v. Bracket*, 32 Vt. 801; *Harper v. Butler*, 2 Pet. 239; *Warren v. Copelin*, 5 Metc. 597. The distinction between a legal and equitable title still exists in New York. *Moore v. Metrop. Bank*, 55 N. Y. 47; *Bush v. Lathrop*, 22 id. 547; *Myers v. Davis*, id. 91.

PAXSON, J. The defense in this action is purely technical. The affidavit of the defendant does not deny the original indebtedness, but avers that the amount due the plaintiffs in their own right has been paid, and as to the claims assigned to them, they could not sue in their own name. The rule is well settled in this State, that a suit upon a chose in action must be brought in the name of the holder of the legal title. An assignment of bonds, specialties and notes, under the Act of 28th of May, 1715, passes the legal title, and the assignee may sue in his own name. This act has no application to debts due upon book account. An assignment of such claims passes merely the equitable title, and the assignee must sue in the name of his assignor. The only exceptions to this rule are those contained in the Act of 23d of April, 1829, viz..

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Where the assignor shall die before suit brought, and no letters of administration have been taken out upon his estate; or where such assignor shall leave the State or cannot be found. It is alleged, however, that this suit can be sustained, for the reason that section 111 of the New York Code, under which these claims were assigned, expressly authorizes and directs suit in such cases to be brought in the name of the assignee. The force of this suggestion depends upon the further question, whether, by the New York Code referred to, the legal title passes, or whether the Code merely authorizes suits to be brought in the name of the holder of the equitable title. So far as the remedy is concerned, it is to be governed by the *lex fori*. Whenever, however, by the *lex loci contractus*, the legal title passes, the holder of such legal title may sue in his own name in whatever forum he may bring his suit. This rule is recognized by Judge STORY, in his Conflict of Laws, §§ 342, 316, 353-4, 358-9. In discussing the subject of transfers of choses in action, not valid by the law of the place where suit is brought, but valid by the law of the place where made, he says: "In such case it would seem that the more correct rule would be that the *lex loci contractus* ought to govern. Under such circumstances, to deny the legal effect of the indorsement, is to construe the obligation, force and effect of a contract made in one place by the law of another. It is not a question as to the form of the remedy, but as to the right." § 354. Again, in sections 565-6, he says: "There does not seem, therefore, any solid ground, upon principle, why a right, confessedly legal in the country where it originated, and passing a direct and positive fixed title in the assignee, should not have the same remedy in every other country which legal fixed titles in the party are there entitled to. It is assuming the very ground in controversy to assert that it is a mere equitable title, for the local law has adjudged it otherwise, and vested the original title *ex directo* in the assignee." To the same point are *Thompson v. Bell*, 2 E. & B. 286; *Vanquelin v. Bouard*, 18 C. B. (N. S.) 341; *Petersen v. The Chemical Bank*, 32 N. Y. 21; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Lefel v. Tucker*, 3 Q. B. 77.

The section of the New York Code referred to (111) is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 181; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract."

The phraseology of this section differs from that of our own Act of 1715, relative to the assignment of bonds, specialties and notes, but it would not be a strained construction to hold that it was intended to accomplish similar results. It would seem to legalize the assignment of

choses in action. The provision that "this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract," is a strong negative pregnant, going to show that such things in action as do arise out of contracts may be assigned. Upon this point, however, we must look for light to the decisions of the courts of the State of New York. Their construction of their own statute, upon such a question as this, is conclusive upon us. In *Myers v. Davis*, 22 N. Y. 491, and *Bush v. Lathrop*, id. 547, it was at least doubted whether the legal title passed by an assignment of a chose in action under the Code. But the later cases look the other way. In *Cummings v. Norris*, 25 N. Y. 625, it was said by ALLEN, J., referring to this section of the Code: "The object of this provision was to abolish the distinction between the former practice of courts of common law and chancery, and to give full effect at law as well as in equity to assignments of rights of actions, by permitting and recognizing the assignee to sue in his own name. * * * The assignment gives him the legal title, and makes him the party plaintiff." In *Hooker v. The Eagle Bank of Rochester*, 30 N. Y. 87, the court say: "Under the Code, an assignment valid as an equitable assignment is equally valid at law." In *Petersen v. The Chemical Bank*, 32 N. Y. 45, it is said: "The law of maintenance, while it existed, prohibited the transfer of the legal title to a chose in action so as to give the assignee a right of action in his own name. But as this is now abrogated, such a demand as that which is asserted, against the defendant in this suit, may be sold and conveyed so as to vest in the purchaser all the legal as well as the equitable rights of the original creditor." To the same effect are *Allen v. Brown*, 44 N. Y. 228, and *Meeker v. Claghorn*, id. 349. In the latter case, the court say: "Within numerous decisions that have been made in this court (Errors and Appeals), and in the Supreme Court, the plaintiff, under the absolute assignment in writing to him, is the *legal* holder of the claim against the defendant, and the real party in interest."

The weight of authority in the New York State courts is very decided that the legal as well as the equitable title passes by an assignment of a chose in action, under their Code. This is decisive of the case. The rule in this State is that the suit must be brought in the name of the holder of the legal title. If the plaintiffs were the holders of the legal title, by the law of the State of New York, where the assignment was made, they are the holders of it here, and their suit was well brought.

We have not adverted to the effect of our statute of 1829. It is not necessary for the purposes of this case. We rest our decision upon the effect of the assignment under the Code of New York.

Order reversed.

 Bell's Gap Railroad Company v. Christy.

BELL'S GAP RAILROAD COMPANY v. CHRISTY.

(79 Penn. St. 54.)

Corporation — recovery for services performed before incorporation.

In an action against a railroad company to recover the value of services performed before the incorporation, in procuring the charter, making surveys, etc., *held*, that plaintiff could not recover, in the absence of proof that a majority of the corporators or promoters of the corporation authorized the service.

ACTION of assumpsit to recover money expended by plaintiff in procuring the charter of the defendants, in payment of surveyors, etc., in making explorations and running the line of their road, etc., and also for his own services in the same matter; the whole occurred before the corporation came into existence, but plaintiff claimed that the defendants having accepted the results of his work, etc., they became liable to pay him.

The verdict was for the plaintiff for \$848.70.

The defendant removed the record to the Supreme Court by writ of error. They assigned a number of errors to the charge and to the answers to the defendants' points. The third and fourth errors were the answers to the defendants' third and fourth points.

D. J. Neff, for plaintiff in error. Plaintiff was president of the promoters, and as such could not hold the corporation liable; corporations are not liable to their officers on a *quantum meruit*. *Kilpatrick v. Penrose Ferry Bridge*, 13 Wright, 118; *Loan Association v. Stonemetz*, 5 Casey, 534. Even if plaintiff's work had been accepted by the defendants, previous notice of his claim was essential to a recovery. *Low v. Conn. & P. R. Railroad*, 45 N. H. 375.; 2 Greenl. on Ev., § 66.

S. S. Blair, for defendant in error. Contracts with a company not organized, but in view of organization, are binding. *Edinboro' Academy v. Robinson*, 1 Wright, 210; *Erie & W. Plankroad Co. v. Brown*, 1 Casey, 156; *Bedford Railroad v. Bowser*, 12 Wright, 29; *Preston v. Liverpool, etc., Railroad*, 7 Eng. Law & Eq. 124; *Gooday v. Colchester & S. V. Railroad*, 15 id. 596; *Edwards v. Grand Junction Railroad*, 1 Myl. & Cr. 650.

PAXSON, J. This case lacks all the elements of a contract, either express or implied. The most that it amounts to is the expenditure by the plaintiff of a certain amount of his time and money in the furtherance of

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a scheme of constructing a railroad. He attended meetings ; visited Harrisburg for the purpose of obtaining a charter ; assisted in making a preliminary survey, and paid some of the expenses thereof. There was no contract with any one for the payment of his services, beyond the statement of some of the parties interested in the project that they would see him paid. All this was prior to the charter, or to any organization of the company. The road which the plaintiff had in view when he made the survey, as appears from his own testimony, was a broad gauge road, to run from Bell's Mills to Erie, and he evidently relied upon aid from New York capitalists to build it, with the expectation of retaining an important position in the company. He did not succeed in obtaining the required aid, and the road to Erie was never constructed or even commenced. Instead thereof, a short local narrow gauge road, called the Bell's Gap Railroad, was built, with the object in part to develop certain coal lands in the vicinity. The stock was principally taken in the neighborhood. The plaintiff, and others interested with him, were among those named as incorporators in the act incorporating the company, but they failed to obtain the control of its organization. Subsequently, the plaintiff brought suit against the company to recover compensation for his services, as before stated, claiming that the company were bound by the promises of the original projectors of the enterprise, inasmuch as said company had accepted the result of his labors and enjoyed its benefits.

None of the cases cited by the defendant in error sustains his position. *The Erie & Waterford Plankroad Company v. Brown*, 1 Casey, 156 ; and *The Bedford Railroad Company v. Bowser*, 12 Wright, 29, were suits upon subscriptions to stock. The case of *The Edinboro' Academy v. Robinson*, 1 Wright, 210, was a subscription in aid of an academy. There is not the slightest analogy between either of these cases and the one under consideration. In *Preston v. The Liverpool, Manchester & New Castle-upon-Tyne Junction Railway Company*, 7 Eng. Law & Eq. Rep. 124, the contract was between the plaintiff and an organized company. This was a case where the projectors agreed to pay the complainant £5,000 for the land to be taken for the railway and incidental damages, and the plaintiff thereupon assented that his land should be so taken. The agreement was in writing between the plaintiff and the executive directors of Lancashire and North Yorkshire Railway Company, which was afterward united with another rival enterprise, under the name of the defendant corporation, and the two companies agreed to adopt the contract with the plaintiff. It is true the company had not yet obtained its charter, but it was still an organization *in esse*, had a board of directors who assume to

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make contracts binding upon the company when it should become thereafter fully clothed with corporate powers. In *Low v. The Railroad Company*, 45 N. H. (1 Hadley) 375, a charter had been obtained, and the services for which the suit was brought were rendered in promoting the organization of the company under the charter, procuring subscriptions to the capital stock, etc. It was held by the court in that case that, "where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete the organization, and after it has been perfected, the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services upon the ground that it must take the burden with the benefit; but that 'no promise to pay would be implied from the fact that such services were rendered at the request of any number of the corporators less than a majority.' "

We do not desire to controvert the principle, established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterward, then if the body for whom the projectors assumed to act does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform. Conceding to this principle its full force and effect, we are unable to see its application to the facts of this case. It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits *cum onere*, and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to evidently must be a majority at least of such persons, and not one, two, or three, or a small minority thereof. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized. In this case the two or three persons who, it is alleged, promised the plaintiff to see him paid, bound no one but themselves. They had no authority to speak for any one else. In the absence of any such

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authority and of any satisfactory proof that the result of the plaintiff's labor and expenditures was accepted and enjoyed by the corporation, that it used the plaintiff's survey or located its road upon any considerable portion of the line thereof, the court below should have instructed the jury that the defendants were not liable.

It is to be observed that in all the cases which were brought to the attention of the court, the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization, as in the case cited in 7 Eng. Law & Eq. Rep., preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one.

We think the court erred in their answer to the defendant's third point. Under all the evidence in the cause it should have been affirmed. There was, also, error in not affirming the defendant's fourth point. It appeared from the defendant's own testimony that the road for which he had made the survey was a broad gauge road with a different terminus, being from Bell's Mills to Erie, and was essentially a different route from that on which the Bell's Gap Railroad was laid out and constructed.

This covers the third and fourth assignments of error. The remaining assignments need not be discussed.

The judgment is reversed and a venire facias de novo awarded.

BARE V. HOFFMAN.

(79 Penn. St. 71.)

Damages — for diversion of water — Evidence.

Action to recover damages for diverting a water-course from plaintiff's tannery by means of a pipe placed by defendant on his own land. *Held*, that plaintiff could recover only for his damage actually suffered before action brought, and not for a permanent injury to his freehold ; and therefore that evidence of the value of the tannery was not competent.

ACTION on the case. The opinion states the facts.

W. H. Woods and R. B. Petriken, for plaintiff in error. The damages must be the proximate consequence of the wrong — not remote or possible. *Seely v. Alden*, 11 P. F. Smith, 304; *Pittsburg Coal Co. v. Foster*, 9 id. 369; *Tillotson v. Smith*, 32 N. H. 90; *Masson's Appeal*, 20

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id. 26; *Smith's Appeal*, 19 id. 474; *Rogers v. Bemus*, 19 P. F. Smith, 432; *McKnight v. Ratcliff*, 8 Wright, 169; Sedgwick on Damages, 71, 72, 73, note 1; *Griffin v. Colver*, 16 N. Y. 489; *Olmstead v. Burke*, 25 Ill. 36; *Shaw v. Wallace*, 1 Dutcher (N. J.), 453; *Pollitt v. Long*, 58 Barb. 20. Interest is not allowable on unliquidated damages or contested claims sounding in damages. *Gilpin v. Consequa*, 1 Pet. C. C. 85; *Willings v. Consequa*, id. 179; Sedgwick on Damages, 377; *Bank v. Tremont Ins. Co.*, 4 Metc. 1.

The plaintiff in error moved on reversal of the judgment to order a restitution of the money made under the execution. They cited for the motion, *Cassel v. Duncan*, 2 S. & R. 57; *Russell v. Gray*, 6 id. 145; *Duncan v. Kirkpatrick*, 13 id. 292; *Breeding v. Blocher*, 5 Casey, 349.

R. M. Spear, for defendant in error. Deprivation of the use of the water would have reduced the product from the tannery, and therefore would be an injury to the freehold. *Ripka v. Sergeant*, 7 W. & S. 14. For an encroachment under a claim of right, a *reversioner* may have his action, although the immediate injury is merely nominal. *Schnable v. Koehler*, 4 Casey, 181; *Williams v. Esling*, 4 Barr, 486; *Delaware & Hudson Canal Co. v. Torrey*, 9 Casey, 143; *Graver v. Sholl*, 6 Wright, 67; *Pastorius v. Fisher*, 1 Rawle, 27; Sedgwick on Damages, 147-8; Angell on Water-courses, §§ 135, 432; *Harder v. Harder*, 26 Barb. 409; *Brown v. Bowen*, 30 N. Y. 519, 38; *Sumner v. Tileston*, 7 Pick. 201; *Starr v. Jackson*, 11 Mass. 519; *Baker v. Sanderson*, 3 Pick. 352. The water-course was a permanent advantage to the inheritance, and the taking it away was an injury to the owner. *Hart v. Evans*, 8 Barr, 13.

The proprietor has a right to the reasonable use of the water running through his land, but cannot, by the mere act of opposition, diminish the quantity of water through his neighbor's land, to the prejudice of his estate in point of value, although enough was still left to the neighbor for the purposes for which he had actually used the water. *Miller v. Miller*, 9 Barr, 76. If the nuisance be of a permanent nature, and injurious to the inheritance, both the *tenant* in possession and the *reversioner* are respectively entitled to recover damages commensurate with the injury. Angell on Water-courses, 585; Washburn on Easements, 662; Sedgwick on Damages, 149-50; *Jesser v. Gifford*, 4 Burrows, 2141; *Young v. Spencer*, 10 B. & C. 145; *Tucker v. Newman*, 11 Ad. & El. 40; 2 Selwyn's Nisi Prius, 1129; *Lienow v. Ritchie*, 8 Pick. 235; *Seely v. Alden*, 11 P. F. Smith, 302.

In actions of tort, the allowance of interest is within the discretion of the jury. Sedgwick on Damages, 441; *Walrath v. Redfield*, 18 N. Y.

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457; *St. Michael's Church v. The County*, Brightly, 121; *Weikel v. Long* 5 P. F. Smith, 238; *Perit v. Wallis*, 2 Dallas, 255. On the sixteenth error they cited *Duncan v. Lawrence*, 12 Harris, 154; *Railroad Co. McElwee*, 17 P. F. Smith, 311; *Railroad Co. v. Henderson*, 1 id. 315.

MERCUR, J. All the errors assigned, except the first and sixteenth, may be considered together. They relate to the measure of damages.

Each party owned and operated a tannery supplied with water from the same stream. Bare also owned other lands situate on the same stream above the tanneries. On those lands he placed a pipe in the stream, thereby withdrawing a portion of the water from its accustomed channel and conveying it to his tannery. Hoffman, under a previous grant from Bare, drew the water necessary to supply his tannery through a pipe placed in the stream above the one put in by Bare. The specific complaint was that Bare took, and failed to return, the water that Hoffman had been accustomed to use, and which he required in carrying away the exhausted tan and offal that accumulated on his premises.

About two months after the water was thus diverted by Bare this action was brought to recover damages.

The defendant in error was permitted, under objection, to give evidence of the permanent injury done to the market value of his tannery by this diversion of the water; and the court charged the jury he was entitled to recover the permanent damages thus done to the freehold.

The whole damage of which the defendant in error complained was caused by Bare's placing a pipe in the stream on his own land. A severance of the connection of the pipe with the stream would cause the water to run in its accustomed channel, and remove the whole cause of complaint. It is not the case of an entry on the land of the defendant in error, and a severance of any part of his freehold; nor of depositing a permanent nuisance thereon, as in *Seely v. Alden*, 11 P. F. Smith, 302. Bare neither took any thing off from Hoffman's land, nor deposited any thing thereon. The act he committed was not of such a permanent character as to assume it to continue through all coming time, and to justify the assessment of damages accordingly.

The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction. Hoffman was both the owner and the occupier of his tannery. Hence the authorities cited, and the argument made, as to the separate remedies of a tenant and reversioner, do not apply. The whole right was in him. For a continued obstruction to the flow

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of water he could sustain successive actions. In each he could recover the damages he had sustained subsequently to the last preceding action.

We think, therefore, the learned judge erred in permitting evidence to be given of the permanent injury to the market value of the tannery, and in charging that the defendant in error was entitled to recover the permanent damage done to the freehold.

If the defendant in error was entitled to recover for damages which he had sustained prior to the commencement of the suit, he was entitled to them as of that date. We therefore see no error in permitting the jury to compute interest thereon down to the time of the verdict as a mode of arriving at a just compensation. The reason of this is fully sustained by *Railroad Co. v. Gesner*, 8 Harris, 240; *Penn. Railroad Co. v. Cooper*, 8 P. F. Smith, 408; and by *D. L. and Western Railroad Co. v. Burson*, 11 id. 869.

The application for a jury to go upon and view the premises was not made until the week on which the cause was set down for trial, and on the very day it was liable to be tried. It was actually tried on the next day. To have granted the application would, therefore, have delayed the trial of the cause. It was not made in time. The court, therefore, committed no error in refusing it on that ground alone.

The sixteenth assignment is to the admission of evidence showing the plaintiff in error had twice, after suit brought, changed the place where his pipe entered the stream. The object of this evidence is not shown by the record. If those acts were wrongful, another action would lie for them. On the argument it was contended that they showed knowledge of the plaintiff in error, that his former act in diverting the water was wrongful. We are unable to see that they lead, or ought to lead, to any such conclusion. They were calculated to confuse and mislead the jury, and ought not to have been admitted. It is true in *Railroad Co. v. McElwee*, 17 P. F. Smith, 811, where the action was for negligence, it was held that an act done after the injury might be shown to prove knowledge of the previous unsafe condition of the structure; yet the reason on which it was sustained is inapplicable to the present case. The assignment is, therefore, sustained.

The defendant in error having collected the judgment by execution, the plaintiff is entitled to an order of restitution. *Duncan v. Kirkpatrick*, 18 S. & R. 292; *Breading v. Blocher*, 5 Casey, 347.

Judgment reversed, restitution ordered, and a venire facias de novo awarded.

Heeter v. Glasgow.

HEETER v. GLASGOW.

(79 Penn. St. 72.)

Deed — acknowledgment — certificate conclusive.

The certificate of a magistrate of the acknowledgment of a deed or mortgage is a judicial act and conclusive in the absence of fraud or duress as to the facts therein stated. The certificate of the acknowledgment by a wife of a mortgage of her own property was in due form ; at the time of the acknowledgment she told the justice she had read the mortgage but he did not make known its contents to her. This appeared by the testimony of the wife and of the justice. The court below decided that this was conclusive against the validity of the mortgage. *Held* to be error ; the whole was for the jury.

SCIRE FACIAS sur mortgage. Part of the defendants pleaded payment and Mrs. Glasgow pleaded besides, *non est factum*, coverture, and that she did not acknowledge said mortgage as the law required.

The land covered by the mortgage was the property of Mrs. Glasgow ; it was dated and acknowledged June 4th, 1872 ; was made by the defendants to the plaintiffs, and was to secure the payment of several notes of the husband to different persons, amounting in all to the sum of \$3,500, for which the plaintiffs were his sureties. The acknowledgment was taken by P. H. Bence, a justice of the peace, and the certificate was in the usual form : the part relating to the wife was as follows :

“ The said Harriet N., being of full age, and by me examined separate and apart from her said husband, and the contents of the foregoing indenture of mortgage being first made fully known to her, declared that she did voluntarily and of her own free will and accord seal, and as her act and deed, deliver the same without any coercion or compulsion of her said husband.”

The case was tried November 17th, 1874, before DEAN, P. J.

The plaintiffs gave the mortgage in evidence, and proved that they had paid the notes recited in it.

The defendants gave evidence by Mrs. Glasgow, that prior to the execution of the mortgage Heeter informed her, in the presence of her husband, that he had been indorsing for her husband, and wished her to sign a paper securing him ; she expressed an unwillingness to do so, and he told her it would never injure her in any way, etc. ; she then consented. Some days afterward her husband requested her to go before

* See *Kerr v. Russell*, 18 Am. Rep. 634.

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the justice and have the paper executed ; they went ; at the justice's the husband produced the paper and both signed it. When the justice was about signing the certificate of acknowledgment, he said he had not read the paper, and did not know what it was but supposed she did ; she replied that she did — she had read it ; the husband was present all the time ; she was not asked whether she executed the paper voluntarily — that if she had been so asked she would have said "No." The mortgage given in evidence was the paper, but at the time she read it it had no enumeration of notes in it ; she did not know that there was a mortgage on her property for a year afterward ; she was not induced to sign by any threats or compulsion of her husband.

The husband testified substantially as his wife had done, as to the occurrences at the justice's office ; also, that the clause about the notes was put in after she had executed it ; that Heeter, plaintiff, had made the suggestion that he should do so.

The plaintiffs, in rebuttal, gave evidence by P. H. Bence, the justice, that the husband executed the mortgage and left the room. He then asked Mrs. Glasgow if she knew the contents of the paper ; said it was his duty to make them known to her if she did not understand them. She said she was acquainted with them, and signed the paper ; he asked her if she did it of her own free will and accord, and without any coercion on the part of her husband ; she said that she did ; the justice was a subscribing witness ; no persons but the parties and the subscribing witnesses were present at the justice's ; Laura Hampson, the other subscribing witness, testified substantially as the justice had done ; Heeter testified, contradicting Glasgow as to his suggesting that the mortgage should be filled in by the insertion of the notes after its execution by Mrs. Glasgow.

There was evidence by the defendants for the purpose of showing that Mrs. Glasgow had been deceived by Heeter and her husband into the execution of the mortgage ; and evidence by the plaintiffs in contradiction of this.

The verdict was for the plaintiffs against S. L. Glasgow for \$3,914.32, and for Mrs. Glasgow, the other defendant.

The plaintiffs took a writ of error, and, amongst others, assigned for error the charge of the court.

R. M. Speer and *R. B. Petriken* (with whom was *W. H. Woods*), for plaintiffs in error. The evidence as to the acknowledgment of the mortgage should have been submitted to the jury. *McCandless v. Engle*, 1 P. F. Smith, 312. The acknowledgment was in legal form. Act 11th

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of April, 1856, § 1, Pamph. L. 315; 1 Br. Purdon, 475, pl. 90; *Minor v. Graham*, 12 Harris, 491; *Haffey v. Carey*, 23 P. F. Smith, 431; *Shinn v. Holmes*, 1 Casey, 142. In taking an acknowledgment, a justice acts judiciously, and his certificate that the required forms have been observed, in the absence of fraud or collusion, is entitled to full faith and credit. *Jamison v. Jamison*, 3 Whart. 469; *Louden v. Blythe*, 4 Harris, 541; *Watson v. Bailey*, 1 Binn. 470; *Graham v. Anderson*, 42 Ill. 514; *Hill v. Bacon*, 43 id. 477. Knowledge of the fraud or duress ought to be brought home to the grantee, or at least knowledge of such circumstances as would put him on inquiry. *Michener and Wife v. Cavender*, 2 Wright, 337; *McCandless v. Engle*, 1 P. F. Smith, 313; *Hall v. Patterson*, id. 289. If it appears from the whole certificate that the contents of the deed were known to the wife, it is as effectual as if the magistrate had certified that he read or otherwise made them known to her. If she knew, it is not material that the justice communicated the knowledge. *McIntire v. Ward*, 5 Binn. 296; *Shaller v. Brand*, 6 id. 435, 438; *Jamison v. Jamison*, 3 Whart. 469; *Barnet v. Barnet*, 15 S. & R. 73; *Battin v. Bigelow*, Peters' C. C. 453; *Jones v. Maffet*, 5 S. & R. 534; *Talbot v. Simpson*, Peters' C. C. 188.

J. Scott (with whom were *S. J. Brown* and *J. M. Bailey*), for defendant in error, cited *Keen v. Coleman*, 3 Wright, 299; *Glidden v. Strupler*, 2 P. F. Smith, 400; *Moore v. Cornell*, 18 id. 320.

PAXSON, J. The parol evidence offered to impeach the magistrate's certificate appears to have been received without objection. The learned judge of the court below, however, fell into error when he assumed that it was conclusive, and withdrew the question of fact from the jury. Opposed to the parol evidence was the official certificate of the magistrate, showing upon its face that Mrs. Glasgow had executed and acknowledged the mortgage in the manner required by law. No matter what the magistrate may have sworn to upon the trial, the plaintiffs were entitled to have his official act go to the jury.

The certificate of a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. It is conclusive of the facts certified to in the absence of fraud or duress. This is the current of all the authorities in this State. *Jamison v. Jamison*, 3 Whart. 457; *Hall v. Patterson*, 1 P. F. Smith, 289; *McCandless v. Engle*, id. 309. In the case first cited, it was held that parol evidence of what passed at the time of the acknowledgment was not admissible for the purpose of contradicting the certificate, except in cases of fraud and imposition. In a number of

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cases parol evidence has been freely admitted to overthrow the certificate, as in *Michener v. Cavender*, 2 Wright, 337; *Louden v. Blythe*, 4 Harris, 541; and *Schrader v. Decker*, 9 Barr, 14. But in all these cases gross fraud and imposition had been practiced, affecting the acknowledgment itself. There is another class of cases in which parol evidence has been admitted to show facts *dehors* the certificate, as in *Keen v. Coleman*, 3 Wright, 299, where a married woman fraudulently represented that she was a widow. The true rule deducible from the authorities is, that the certificate of the justice of the acknowledgment of a deed or mortgage is a judicial act, and in the absence of fraud or duress, conclusive as to the facts therein stated. A purchaser, *bona fide*, and without notice of the fraud, is protected against it; but as to all other persons parol evidence has been admitted to show fraud or duress connected with the acknowledgment.

There was not a particle of evidence in this case to indicate either fraud or duress in any thing that occurred at the magistrate's office. That officer appears to have acted in entire good faith. If there was any fraud it was *dehors* the certificate, and the evidence leaves us in doubt as to whose door it should be laid.

Judgment reversed and a venire facias de novo awarded.

 FIRST NATIONAL BANK OF CARLISLE V. GRAHAM.

(79 Penn. St. 106.)

National Bank — deposits for safe-keeping — liability of bailees.

In an action against a national bank to recover bonds deposited with it for safe-keeping, without compensation, and which the bank alleged were stolen from its vaults, *held*, (1) that the bank was liable only for gross negligence; (2) that its failure to give prompt notice of the robbery was a question for the jury as bearing on the question of negligence; and (3) that while the mere voluntary act of the cashier in receiving the funds would not subject the bank to liability, yet if the deposit was known to the directors and they acquiesced in its retention, a contract relation was created by which the defendants would be held bound.

ACTION of assumpsit to recover the value of four United States bonds of \$1,000, cash deposited with the defendant by the plaintiff for safe-keeping, and for which there was given to the plaintiff the following receipt :

“ CARLISLE, Pa., October 22d, 1868.

Miss F. L. Graham has left in this bank, for safe-keeping, four

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thousand dollars in U. S. 5-20 bonds of 1867. to be returned on the return of this receipt.

CHARLES H. HEPBURN, *Cashier.*'

When the plaintiff demanded the bonds, they were not delivered to her, the officers of the bank informing her that they had been stolen, August 5th, 1871, from the vault of the bank, with other valuables. The plaintiff alleged that the bonds were lost through the negligence of the defendant.

On the trial it was proved that the fact of the robbery had never been publicly disclosed. The officers feared that such a disclosure would injuriously affect the credit of the bank, and the president and cashier undertook, in their individual capacities, to become liable for the principal, interest and premium of the bonds of depositors that had been lost. Notice was given to the Assistant United States Treasurer in New York, and to the Treasury Department at Washington. The plaintiff was informed of the loss through her brother, residing in Monmouth, Ill., some bonds issued by an association there being among the securities lost. And notice was given to the association by the officers of the bank.

The verdict was for the plaintiff for \$4,790, and the defendant took writ of error.

S. Hepburn, Jr., and W. F. Sadler, for plaintiff in error.

J. Hays, and J. H. Graham, for defendant in error.

WOODWARD, J. [After deciding a question of evidence.] The next question is presented by the series of assignments which allege error in the instructions given to the jury as to the measure and extent of the responsibility of the defendants. Assuming for present purposes, on the faith of the verdict, that the act of the cashier was so far acquiesced in and ratified by the officers and directors, as to create a contract between the plaintiff and the bank, it is manifest that the contract amounted at the utmost to a naked bailment. It was a deposit without compensation. No undertaking was expressed except that the bonds were to be returned on the return of the cashier's receipt. The law regulating such a contract has been settled since the decision of *Coggs v. Bernard*, 2 Ld. Raym. 909, in the year 1703. "Where a man takes goods into his custody to keep for the use of the bailor," it was said by HOLT, C. J., in that case, "he is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must

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be guilty of some gross neglect." The principles which govern the relations between bailors and bailees are succinctly stated in Story on Bailments, § 23. "When the bailment is for the sole benefit of the bailor, the law requires only *slight* diligence on the part of the bailee, and of course makes him answerable only for *gross* neglect. When the bailment is for the sole benefit of the bailee, the law requires *great* diligence on the part of the bailee, and makes him responsible for *slight* neglect. When the bailment is reciprocally beneficial to both parties, the law requires *ordinary* diligence on the part of the bailee, and makes him responsible for *ordinary* neglect." In *Tompkins v. Saltmarsh*, 14 S. & R. 275, DUNCAN, J., in delivering the opinion of the court, said: "Where one undertakes to perform a gratuitous act, from which he is to receive no benefit, and the benefit is to accrue solely to the bailor, the bailee is liable only for gross negligence, *dolo proximus*, a practice equal to a fraud. It is that omission of care which even the most inattentive and thoughtless men take of their own concerns. There is this marked difference in cases where ordinary diligence is required, and where a party is accountable only for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns, and that diligence is necessarily required where the contract is reciprocally beneficial. The bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take."

These principles were applied by COULTER, J., in *Lloyd v. The West Branch Bank*, 3 Harris, 176, and by the present chief justice in *Scott v. The National Bank of Chester Valley*, 22 P. F. Smith, 471, and were recognized by THOMPSON, C. J., in *The Lancaster County Bank v. Smith*, 12 P. F. Smith, 54. In view of these well-established rules, the presentation to the jury of the legal aspects of this cause was inadequate and imperfect. There was no dispute that this was a gratuitous bailment, and in the general charge the court properly limited the responsibility of the defendant to a case of gross neglect. But this gross neglect was defined to be "the omission of those precautions which persons of common care and common prudence would naturally adopt, though they might, in reference to their own goods, omit them."

In the plaintiff's first point, the court were asked to charge that the defendants were "bound to exercise ordinary care, skill and diligence to keep and return the bonds safely; such care as men of ordinary prudence exercise in the care of their own property." The answer was in these words: "First point affirmed, and for the meaning of gross negligence

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the jury are referred to the general charge." In the plaintiff's third point, the court was asked to say, that "if the defendants were negligent, and did not exercise ordinary care, skill and caution, to keep the plaintiff's bonds safely, then they are liable for their value, no matter how negligent they may have been in taking care of their own property." The answer was: "Affirmed—see general charge." The defendants had the right to complain of the manner in which the cause was submitted to the jury. The standard of duty established for them was one to which they could not, under the evidence, be justly held. In the language of Judge DUNCAN, in *Tompkins v. Saltmarsh*, "they were responsible for the omission of care which even the most inattentive and thoughtless men take of their own concerns."

Upon the trial the ground was assumed by the defendants that there could be no recovery against them if the jury should find that they had taken the same care of the plaintiff's bonds that they had taken of their own securities, and complaint is now made of the failure of the court to sustain their position. In a multitude of cases, language has been used by judges which would seem to indicate the existence of the rule for which the defendants contend. Such language was employed in *Foster v. The Essex Bank*, 17 Mass. 479, and in the cases already referred to, of *Coggs v. Bernard*, *Lloyd v. The West Branch Bank*, and *Scott v. National Bank of Chester Valley*. In general, however, this view of the law has been abstractly stated, and where it has been applied, as in *Lloyd v. The West Branch Bank*, the diligence used by the bailee in the oversight equally of the deposit and his own property, corresponded with that diligence to which, in the circumstances of the particular bailment, the law held him bound. The authorities relied on by the defendants "do not seem," Judge STORY has said, "to express the general rule in its true meaning. The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual, but it looks to the conduct and character of a whole class of persons." Story on Bailments, 564. The fact that the bailee keeps the property of the bailor, with the ordinary care with which he keeps his own, does not fulfill the measure of his legal duty where the contract is one which requires strict diligence and extraordinary care. So, under a contract of bailment, in which the benefits are reciprocal, the bailee is not shielded from liability for neglect of ordinary care by proving that he has been careless, inattentive and reckless in the management of his goods as well

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as those of the bailor. Cases for the application of the maxim of the Emperor Constantine, quoted in Jones on Bailments, 83, "*Aliena negotia exacto officio gerunter*," must constantly arise. The terms used in the authorities referred to are employed more by way of illustration than as a statement of the legal rule. That the bailee has dealt with his property and the bailor's in the same way, is a fact which may be always shown as an element in adjusting the standard of duty, and deciding the question of its performance, as well as a test of the bailee's good faith. On the proof of such a fact, a presumption of adequate diligence would ordinarily arise. But the question of the bailee's responsibility must be finally settled by a resort to the settled principle which deduces the measure of his duty in each particular bailment, from a comparison of his conduct with the conduct not of individuals, but of classes of men. The instructions of the court on this subject in the general charge were, that, if the bailee "takes the same care of the goods bailed that he does of his own, that ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it was shown that he was grossly negligent of both, and when this is done he is not excused, but held answerable." It is conceived that these instructions were unobjectionable. Whether the defendants were guilty of such gross negligence as to make them liable, was a question which, like that which was raised as to the fact of robbery, and like the other issues involved, it was for the jury, under all the evidence, exclusively to decide.

Another error is alleged to have consisted in the answer by the court to the plaintiff's seventh point, relating to the failure of the bank to give notice of the robbery, and in the direction given to the jury on the same subject in the general charge. The discussion of the point undoubtedly was unduly amplified. The limitation of the plaintiff's right to a verdict only in the event that gross negligence should be made out, was neither expressed nor implied. The instruction, in substance, was, that she could recover if injury resulted to her from the failure of the defendants to give her notice, and that she could recover for such injury, if found, even though the presumption of negligence arising from the want of notice was repelled by proof. The effect of such a direction could only be to leave the precise question on which the jury were to pass in obscurity and doubt. The plaintiff in her testimony stated that she received intelligence of the loss through her brother in Monmouth three or four weeks after it occurred. Charles H. Hepburn thought the

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interval between the loss and the conversation he had with the plaintiff in regard to it was only eight or ten days. From the time she received notice, if upon a fair representation of their views and motives, she acquiesced in the policy of silence which the officers of the bank had adopted, it would be unjust to permit her to set up the subsequent maintenance of that policy as a ground for the imputation of gross negligence against the defendants. But the fact that no announcement was made in the interval, whatever it was, before the plaintiff was informed of the loss, was fairly a subject for the consideration of a jury. It was for them to weigh it in connection with the other evidence, in deciding the material issues in the cause. Its relevancy and value are shown by the significance that was attached to the proof of the conduct of a bailee contemporaneously with and immediately after a loss of property, in *Tompkins v. Saltmarsh*, *supra*. "I am of opinion likewise," Judge DUNCAN said, "that evidence ought to have been received of the hue and cry immediately after the discovery — his assiduous and indefatigable pursuit, and strict search, both at the inn and the steamboat. If he had made no complaint or inquiry, remained with his arms folded and his mouth shut, this would have afforded strong evidence of his delinquency; and though it has been said this would have been the course of a guilty man, yet it is one which an innocent man would naturally take, and which, if he did not take, all would condemn him. Nothing would more strongly prove his neglect than this silence, this indifference; the jury would have drawn the most unfavorable conclusions from it." Every case must stand, of course, on its facts. It may well be that the reasons for the action of the officers of the bank would be satisfactory to a jury, but the necessity is inevitable of submitting the question to them whether that action involved gross neglect.

The remaining question arises out of the answer of the court to the second point of the defendants. The mere voluntary act of the cashier in receiving the plaintiff's securities would not subject the bank to liability. But if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created, by which the defendants should be held bound. The question arose in *Foster v. The Essex Bank*, 17 Mass. 479. That was an action to recover the value of a special deposit. The bank had no express power by charter to receive deposits of any kind, but the verdict found that the practice had been to receive them always; and PARKER, C. J., said: "As the bank from the time of its incorporation has received money and other valuable things in this way, and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far

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as a corporation can be affected with knowledge; and as the buildings and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered the depository, and not the cashier or other officer through whose agency commodities may have been received into the bank. The rule thus stated has been uniformly applied by this court in cases involving the rights and duties of the national banks. The principle announced in the recent New York and Vermont cases of *The First National Bank of Lyons v. The Ocean National Bank*, 19 Am. Rep. 181, and *Wiley v. The First National Bank of Brattleboro'*, id. 122, has never been adopted here, so far as it is in conflict with the rule. If the question here had grown out of an act prohibited by law, the principle of these recent authorities would be applicable, as it was applied in *Fowler v. Scully*, 22 P. F. Smith, 456; S. C., 13 Am. Rep. 699. But the question arises out of an act which has been neither directly nor impliedly forbidden by statute. The answer of the court was accurate, and the complaint alleged against it in the supplemental assignment of error is unfounded.

Judgment reversed, and a venire facias de novo awarded.

HORNER v. WATSON.

(79 Penn. St. 242.)

Mining — support of surface — custom.

The owner of a coal mine in working it removed the "ribs" of coal which supported the roof, by reason whereof the surface sank and surface water flowed into the mine and thence into the mine of an adjoining owner. *Held*, that the former was liable to the latter for the damage, though he had worked according to the usages of miners and without negligence.

The mining right is servient to the surface to the extent of sufficient supports to support it, and a custom to the contrary is not good.

ACTIONS in the case by Watson and another against Horner and another, to recover damages alleged to have been caused to plaintiff through defendants' negligence. The parties were adjoining mine owners and the damage was the flooding of plaintiff's mine.

The common grantor of the parties was Hays, who was the owner of the surface under which both mines were. On August 12, 1858, Hays agreed with defendants to sell them all the mineral coal lying in and under a piece of land in Baldwin township, with the privilege of enter-

ing "forthwith on the lands of Hays overlying and adjacent thereto, for the purposes of mining, excavating and removing said coal, and also a sufficient right of way * * * over and through the lands of said Hays on the lower side of Beck's run from the pit's mouth to the Monongahela river for the transportation of said coal," with privilege of a landing for twenty years, * * * also, the further privilege of driving and excavating such entries through the adjoining lands of the said Hays as may be required by them for ventilation and drainage of their pits and mines, without charge for the coal necessarily removed by them in the operation; the said Hays, however, reserving the like privileges of driving and excavating entries through the coal hereinbefore described of the said (Horner and Hyatt) for the like purposes for the use of his own mines upon the adjoining lands now owned by said Hays, and also the right of retaining such of the entries of (Horner and Hyatt) as he may desire to preserve, making, however, a ratable abatement for the amount of coal left for their support, and the amount removed by himself in the exercise of the privilege of driving the entries aforesaid through the coal of (Horner and Hyatt) from the purchase-money hereinafter stipulated to be paid at the rate of \$500 per acre for the amount thus retained." * * *

The defendants opened their mines in August or September, 1853.

On the 10th of September, 1856, Hays sold to the plaintiffs a piece of coal land adjoining that of the defendants' on the westerly side.

The plaintiffs commenced to mine in March, 1857.

The case was tried, February 26th, 1874, before STOWE, J.

The plaintiffs' evidence was that they continued to work at the mine until early in 1861, when in consequence of the great depression of the coal trade they ceased mining until the spring of 1863. The defendants also stopped mining, but began three or four months before the plaintiffs. There was no trouble to the plaintiffs' mine about water until the year 1864, when the water came in from defendants' mine so as to interfere with plaintiffs' work in their mines, and continued increasing; plaintiffs procured a steam pump, which for some time relieved them; they agreed with the defendants that the latter should pump the water, using plaintiffs' pumps; they neglected to pump and the water increased very much; when remonstrated with by plaintiffs, defendants refused to pump any more, saying that the coming in of water was the act of God; plaintiffs afterward made a drain at great expense to Beck's run. There was evidence further that the defendants had been taking down the "ribs" or pillars composed of coal; that in consequence the superincumbent surface sank and cracked; that the rain, melted snow,

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etc., ran through the breaks in the surface into the defendants' mine, and thence in great quantities into the plaintiffs' mines, which were lower than the defendants'. The plaintiffs gave evidence also of the expense to which they were put in freeing their mines from the water.

The defendants gave evidence that quantities of water would collect in all coal mines from the working of them, especially where there were veins of clay through the coal, as frequently was the case. They gave evidence also, for the purpose of showing that the water which flowed from their mines into the plaintiffs' was the result of the ordinary and proper working of their mines into the plaintiffs' and not the result of negligence or want of care. They gave evidence also that their mines were as well opened as any mines on the river; that it was proper mining, and the approved, established and customary manner of mining bituminous coal to take out the ribs or pillars without reference to its effect as to the sinking of the surface.

The verdict was for the plaintiffs for \$7,100.

The defendants took a writ of error and assigned for error: the answer to their second point and the part of the charge in brackets.

M. W. Acheson, for plaintiffs in error. The plaintiffs should have left a sufficient rib of coal on the line between them and defendants which would have been effectual to prevent the water from coming in. *Bainbridge on Mines*, 455. An owner of a coal mine may work it as is most advantageous to himself, although the natural consequence may be some prejudice to the adjoining owner. *Smith v. Kenrick*, 7 M., G. & S. 515; *Bainbridge on Mines*, 460; *Acton v. Blundell*, 12 M. & W. 324; *Kauffman v. Griesemer*, 2 Casey, 407.

A. M. Watson, for defendants in error, cited *Smith v. Kenrick*; *Acton v. Blundell*, *supra*; *Baird v. Williamson*, 109 Eng. Com. L. Rep. 388; *Jones v. Wagner*, 16 P. F. Smith, 429.

GORDON, J. The rights of both the plaintiffs and defendants, who hold adjacent coal fields, are derived from a common grantor, James H. Hays, the title of the defendants ante-dates that of the plaintiffs, hence, it is not controverted but that any right or privilege, directly conferred, by the deed or articles of Hays to the vendors of the former, or which, by necessary construction or implication, arises therefrom, must dominate any conflicting right or privilege found in the conveyance to the plaintiffs. They must take subject to the precedent grant. If, then, the defendants, Horner, Wood & Co., had the right under their contract to withdraw all the coal found within their grant, without leaving any ribs,

tion to the custom pleaded was that it was uncertain and unreasonable pillars or other supports to sustain the surface, it is clear that the subsequent vendees of the adjoining track took subject to such right, and of the consequent falling in of the superincumbent land, and the intrusion of surface water into their works, they cannot complain. The whole question, which we are required to consider, is raised from that part of the charge of the learned judge of the court below, wherein, after stating that the owner of a mine has a right to mine his coal in an ordinary way so long as that does no injury more than what necessarily arises from the removal of the coal, and that he would not be liable for the collection and flow, by reason of such mining, of subterranean water upon lower mines, he adds: "But otherwise where mining is done in such a manner (whether the ordinary way or not) as to introduce foreign water from the surface or higher land, by reason of the roof falling in and thus introducing water from the surface which would not have flowed in if the roof of the mines had remained undisturbed and compact after the coal was removed." This was responsive to the defendants' second point, which was negatived, which required the court to charge that the defendants were not liable for the introduction of such surface water, if not occasioned by the willful and wanton acts of the defendants, but was a necessary consequence of their mining according to the "approved, established and customary course and practice of mining in this region, and without any negligence in the operation of mining." The defendants thus endeavored to put themselves upon an alleged custom of the country which permitted the withdrawing of all the supporting ribs and pillars of a coal mine and the consequent subsidence of the soil. Now, though in our opinion the contract cannot in itself be so construed as to warrant a withdrawal of all surface support, yet if the custom contended for be established, it follows, that, in the absence of any provision to the contrary, it must govern and interpret the agreement of the parties, as it would be presumed they acted with reference to such custom in framing their compact. But the learned judge who tried this case in the Common Pleas refused to recognize any such custom; in this we think he was right. This identical point was raised in the case of *Jones v. Wagner*, 16 P. F. Smith, 429; S. C., 5 Am. Rep. 385, where it was held, that of common right the mining right was servient to the surface to the extent of sufficient supports to sustain it, and that there could be no custom to the contrary. The reason given for this conclusion was that the business of mining in the western part of the State was of a date too recent to give such a custom the age necessary for its validity. We are willing, however, to

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go one step further and say, that the alleged usage lacks another essential feature of a good custom, and that is reasonableness. It is not reasonable that that which the law grants as of common right should, not merely be modified, but abrogated by custom or usage. When A grants to B a tract of land, reserving the minerals under it, the legal presumption is that B shall have and enjoy the exclusive and uninterrupted use of the surface, but if A may, notwithstanding, under the plea of some general custom, dig out the foundations of the land and let down the surface, or render it so dangerous that it cannot be used, it is clear that he may thus destroy his own grant and invalidate the rights with which the law clothes his own vendee.

This court, in *Jones v. Wagner*, adopted the English decisions upon this subject, and as these decisions embody an experience in the business of mining much greater than our own, they are entitled to the greatest respect. So when we consider the super-eminent importance of this industry to the British Isles, we may be sure that the judiciary thereof would not wittingly deprive it of any of its just rights or privileges. Turning then to these decisions, we everywhere find that the plea of a custom which would warrant the withdrawal of a proper support to surface land is treated as unreasonable and invalid. And first, with reference to the construction of a contract such as that now under consideration, we have in the case of *Harris v. Ryding*, 5 M. & W. 60, a judicial exposition in point. In that case there was a grant of the surface with a reservation in the strongest possible terms of all and every part of the mines and minerals in the land. It was held, however, that the grantor could not withdraw all the coals without leaving a proper support for the surface; Baron PARKE observing that by reasonable intendment, under the reservation, the grantor could only be entitled to so much of the mines below as would be consistent with the proper enjoyment of the surface. On the question of the validity of a custom tending to affect such intendment, we have first the case of *Hilton v. Lord Granville*, 5 Ad. & El. (N. S.) 701. The declaration was in case, charging that the defendant dug his mines so near the plaintiff's premises as to crack the ground, etc. The defendant pleaded a prescription to take the coals under any messuages, buildings or lands in the manor, and without liability for damages that might occur in consequence of the taking thereof. *Held*, that such a prescription was void because unreasonable, and that a custom similarly pleaded was void for the same reason; the objection being equally fatal to both. For a precedent for holding such custom bad, reference was had to the opinion of WILLES, C. J., in *Broadbent v. Wilks*, Willes, 860, in which it is said that the true objec-

—as it might deprive the tenant of the whole benefit of his land. Lord DENMAN, C. J., adds, that a claim destructive of the subject-matter of the supposed grant cannot be set up by any usage, “and that the prescription or custom here pleaded has this destructive effect and is so repugnant and void, appears to us too clear, from the single statement, to admit of illustration by argument.” Not less destructive to the grantor’s reserved rights would be the custom set up in the case in hand, for not only would it defeat any use which he might otherwise have of the reserved surface, but, by introducing surface water, would be destructive of his adjacent mines. The next case to which we make reference is that of *Humphries v. Brogden*, 12 Ad. & El. (N. S.) 739. The plaintiff charged in his *narr.* that the defendant carelessly, etc., and without leaving any pillars or supports, and contrary to the custom of the country, in that behalf, so worked his mines as to crack open and to cause to subside the soil, etc. The plea was not guilty. The jury found the defendant had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports. A verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant if the court should be of the opinion that, under these circumstances, the action was not maintainable. *Held*, the plaintiff was, on this finding, entitled to judgment; for that of common right, the owner of the surface is entitled to support from the subjacent strata. In delivering the opinion of the court, Lord CAMPBELL, C. J., says: that if the owner of two adjacent closes should alien one of them, his alienee, without a grant to that effect, is entitled to lateral support *eo instante* the deed is executed as much as after twenty years or any longer period, and that *pari ratione*, where there are separate freeholds of the surface land and the mineral, the former is entitled to support from the subjacent strata. For if this be not so, the surface cannot be securely enjoyed as property, and that circumstances are conceivable, as the great thickness of the minerals and their proximity to the surface, under which it would be rendered wholly worthless. He then comes to the conclusion that the rule, giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant must be laid down generally without reference to the nature of the strata or the difficulty of propping up the surface or the comparative value of surface and mineral. The learned justice further adds: that he is not aware of any principle upon which qualifications could be added to the rule, and that an attempt to introduce them would lead to uncertainty and litigation. The case of *Hilton v. Lord Granville* was cited and approved as sustaining the doctrine that the custom therein con-

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tended for was void because unreasonable. The last case we have upon this subject is that of *Blackett v. Bradley*, 1 B. & S. 940.

In answer to the charge that they had wrongfully and without leaving proper supports, so worked their mines under the plaintiffs' land as to cause it to fall in, the defendants pleaded title to the mines, under the said land, by virtue of the inclosure act, and, further, that from time immemorial up to the framing of said act, the lord of the manor and his assigns had been used and accustomed, as of right, to search for, win and work the mines under the commons without leaving any support for the lands under which the said mines were situate, etc., and that from the time of the passing of the act the mines had been so worked without leaving any support, and that the defendants worked the mines under a lease thereof of the lord. On demurrer, it was held that the plea was bad, such a prescription having been held invalid in *Hilton v. The Earl of Granville*, 5 Q. B. 701. WIGHTMAN, J., said, during the argument of the demurrer to the fourth plea, which was framed under the Act of 2 & 8 W. 4, ch. 701, shortening the period of prescription: "If the custom is bad it cannot be made better under Lord Tenterden's Act." The whole case was finally disposed of on the authority of the case last above cited; COCKBURN, C. J., remarking, that though some of the reasoning in that case had been overruled in the House of Lords in *Rowbotham v. Wilson*, yet the decision itself remained unaffected.

These authorities, then, teach us that in whatever shape the plea for destruction of the surface right may come, whether as a prescription or custom, it is bad as tending to defeat the original grant. A distinction has been attempted between a grant of the surface by the owner of the whole fee, and a reservation thereof in his own favor as implied from the conveyance of the minerals alone. But this distinction is not sound. The right of support is *ex jure naturæ*, hence, as no doubt can arise as to its character, it cannot come within the category of those ambiguities which must be construed most favorably for the grantee and most strongly against the grantor. So the very point is met in *Jones v. Wagner*, by a citation from Rogers on Mining, p. 455, where it is said: "If an owner of lands grant a lease of the minerals beneath the surface with a power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface."

In conclusion we may say that we have carefully examined the article of agreement between James H. Hays and Horner and Hyatt, and find nothing therein contained which would take them out of the rule above stated, and that on the whole case we consider the rulings in the court below unexceptionable.

The judgment is affirmed.

WILLIAMS and MERCUR, JJ., dissent.

SCULLY V. KIRKPATRICK.

(79 Penn. St. 324.)

Bail bond — action on defense — sickness of principal.

Action on a bond given by a prisoner, with surety, conditioned for his appearance at court on a future day ; defense that on the day he was prevented by sickness from appearing, but did appear as soon after as he was well enough. *Held*, that the defense was good.

ACTION of debt on a bond executed by Abraham Gumberts as principal and the defendant as surety conditioned " that, whereas, the above bounden A. Gumberts was brought before the said John M. Kirkpatrick, judge aforesaid, on a warrant of arrest upon the petition of Joseph S. Finch & Co., under the provisions of the Act of July 12th, 1842; and whereas, the hearing was by the said judge continued until Wednesday, the 18th day of June, 1873, at District Court room, No. 2, at 10 A. M. Therefore if the said A. Gumberts do appear at the time and place aforesaid, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue."

The defendant offered to show : " That prior to, and on the 18th day of June, 1873, the time appointed in bond in suit for the appearance of A. Gumberts before the Hon. JOHN M. KIRKPATRICK to answer the warrant of arrest in the bench warrant proceeding — he, the said Gumberts, was ill and unable to appear at the time and place required by the said bond ; that a few days before June 18th, 1873, he had been stricken down by sickness at his home at Evansville, Indiana, and was thereby prevented appearing in the District Court at Pittsburg on June 18th, 1873 ; to be followed by evidence that so soon as said Gumberts was able to leave home, to wit, on the 30th day of June, 1873, he hastened to Pittsburg, and appeared in the District Court of Allegheny county, before the Hon. JOHN M. KIRKPATRICK (the said Joseph S. Finch & Co. and their counsel being then and there present) to answer the complaint of Joseph S. Finch & Co. in the bench warrant proceedings, the 30th of June being the earliest day he was able to appear at Pittsburg after his recovery from his illness ; and that since then said Gumberts died. For the purpose of showing that by the act of God the said Gumberts was unable to appear before Judge KIRKPATRICK on June 18th, 1873, and the defendant, Scully, was unable to produce him ; and also for the purpose of showing that there was no breach of condition of the bond in suit."

The offer was rejected and a bill of exceptions sealed for the defendants.

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The jury found for the plaintiff for \$10,000, the amount of the bond, to be released on payment of \$8,721.58, subject to the opinion of the court on question of law reserved, viz.:

“ Whether the District Court of Allegheny county had jurisdiction of the bench warrant proceedings instituted by Joseph S. Finch & Co. against A. Gumberts, after the said Joseph S. Finch & Co. had instituted the proceedings in bankruptcy against said Gumberts in the United States District Court for the District of Indiana, and during the pendency thereof, and whether the bond in suit taken pending the said bankrupt proceedings can be enforced against the said John D. Scully.”

The court entered judgment on the verdict for the plaintiff on the reversed question.

The defendant took a writ of error.

D. T. Watson & R. B. Carnahan, for defendant in error.

SHARSWOOD, J. [After deciding some questions not of general interest.] The only other question presented arises upon the sixth assignment of error — the rejection of the offer of evidence by the defendant. The bond in suit was given under the provision of the 6th section of the Act of 1842, that “in case of an adjournment the judge may take a bond with or without surety for the appearance of the party arrested at the adjourned hearing.” The day named in the condition of the bond for the adjourned hearing was June 18th, 1873. The rejected offer was to prove “that a few days before June 18th, 1873, the defendant Gumberts had been stricken down by sickness, at his home at Evansville, Indiana, and was thereby prevented appearing at the day fixed, to be followed by evidence that so soon as said Gumberts was able to leave home, to wit, on the 30th day of June, 1873, he hastened to Pittsburg and appeared before Judge KIRKPATRICK to answer the complaint; the 30th of June being the earliest day he was able to appear at Pittsburg after his recovery from his illness.” This evidence was objected to as irrelevant, and incompetent because contradicting the record. We have seen that there was no record to contradict, and that, in his action in the premises, Judge KIRKPATRICK was not acting as a court of record, and had no power to adjudge the bond to have been forfeited.

It remains to consider whether the facts presented in the offer were relevant to the issue; in other words, whether they would have constituted a good defense had the breach of the condition been proved — the offer in effect admitting that Gumberts did not appear before Judge KIRKPATRICK on the 18th June, 1873, the day appointed for the adjourned hearing.

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It is undoubted law that if the condition of a bond becomes impossible to be performed by the act of God, the obligation is discharged. Co. Litt. 206 a. But a condition was then only considered in the eye of the law as impossible if it could not by any means take effect : id. ; Butler's note, 98. Death of the party who is to perform the condition of course releases the bonds ; but that it could only be done with great danger to the life of the party is not sufficient. Some hard examples are to be found in cases of special bail, but there is a peculiarity in the alternative condition of the recognizance of special bail which is to be remembered in reading these cases. *Wynn v. Petty*, 4 East, 102 ; *Grant v. Fagan*, id. 189 ; *Bowerbank v. Payne*, 2 Wash. C. C. Rep. 464 ; *Rathbone v. Warren*, 4 Johns. 310 ; *Olcott v. Lilly*, id. 407. Some relaxation of the rigidity of the rule occasionally appears. *Thomas v. Bulkley*, 5 Cow. 25 ; *Boardman v. Fowler*, 1 Johns. Cas. 41. The power of a court in giving relief against their own orders, though of the most final and absolute kind, is illustrated in *Doty v. Whittlesey*, 1 Root, 310. There a party on his way to pay money for the redemption of a mortgage under a final and absolute decree of foreclosure at a day certain, was taken sick and could not proceed : the court extended the time. See, also, *Crane v. Hanks*, id. 468.

It is said, indeed, that in matters of positive contract and obligation created by the party (for it is different in obligations or duties created by law) it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident ; or that he had been in no default. The reason is that he might have provided for such contingencies by his contract if he had so chosen. 1 Story's Eq. Jur., § 101.

This reason, however, would not apply to the case before us ; for this was a statutory bond and could only be given in the form prescribed, as was held by this court in *McClelland v. Smith*, 2 Jones, 303.

The principle so broadly stated is not supported by the later cases. Equity will often in the case of positive contract give relief, not perhaps on the ground of accident, but by an equitable interpretation of the terms of the contract. They will imply that the parties necessarily intended an exception. *Pollard v. Shaaffer*, 1 Dall. 210, an early case in this State, was of that character. The later English cases very distinctly recognize this equitable doctrine. In *Hall v. Wright*, El., B. & E. 746, CROMPTON, J., said : " When a contract depends upon personal skill, and the act of God renders it impossible, as for instance in the case of a painter employed to paint a picture, who is struck blind, it may be that the performance might be excused." And see *Taylor v. Caldwell*, 3 Best & Smith, 826

In *Boast v. Firth*, Law Rep., 4 C. B. 1, to an action for breach of an apprenticeship deed, the defendant (the father) pleaded that the apprentice

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" was and is prevented by the act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all the said term ; " it was held on demurrer a good plea or excuse of performance. There are several American cases which sustain the position that when the act to be performed is of a purely personal character, which can only be done by the party himself, the act of God, in producing sickness and insanity as well as death, will be an excuse for performance. *Dickey v. Linscott*, 7 Shepley, 453 ; *Knight v. Bean*, 9 id. 536 ; *Fenton v. Clark*, 11 Vt. 557 ; *Hubbard v. Belden*, 1 Williams, 645 ; *Fuller v. Brown*, 11 Metc. 440 ; *Fahy v. North*, 19 Barb. 342 ; *Wolfe v. Howes*, 24 id. 174 ; *Jarrell v. Farris*, 6 Mo. 159. And there is a decision by the Supreme Court in New York which applies the principle to a case precisely the same as that before us, and is therefore directly in point. In an action of debt on a recognizance conditioned that the sheriff arrested on an attachment should appear on a day named to answer for a contempt, the defendant, the surety in the recognizance, pleaded that the sheriff before the day was taken violently sick and could not be removed ; after the day he died. On demurrer the plea was held to be sufficient. *The People v. Manning*, 8 Cow. 297.

And is it not a most reasonable and just doctrine ? Had Gumberts died on the 17th of June, 1873, the bond would have been discharged and the surety released. Would it not shock our sense of common justice in a court where equity is part of the law, to be told that if he was dying on that day, but did not expire until the 19th of June, we must hold his surety bound ? The impossibility of personal appearance would have been the same in both cases. If he had become a raving maniac, must he be brought before the judge in a strait jacket ? In either case his presence would have answered no purpose of the inquiry. He could have replied to no questions. Had he, however, put in no appearance before his death, there would have been some force in the contention that the plaintiff had lost all the benefit of his proceeding, and the surety must bear the consequences — that the plaintiff had the law on his side and equal equity, and there ought therefore to be no interposition in behalf of the surety. But the offer here was to show that Gumberts did appear as soon as he was able, and the plaintiff might have had all the advantage of the proceeding. If, then, his excuse for not appearing at the day named was a valid one in equity, his appearance at the subsequent term as soon as he was able saved the bond, and the error of the judge in not continuing the proceeding ought not to prejudice his surety.

Judgment reversed, and venire facias de novo awarded.

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NOBLE v. THE THOMPSON OIL COMPANY.

(79 Penn. St. 354.)

Judgment — assignment of — attachment of judgment debtor as garnishee after assignment — foreign attachment.

A corporation of Pennsylvania recovered a judgment there against J. S., and assigned it in good faith to a resident of that State. After the assignment but before J. S. had notice of it he was attached in New York, where he resided, as garnishee of the corporation, by a creditor thereof and adjudged by the New York court liable as such garnishee, notwithstanding the assignment, and he paid to the attaching creditor the amount of his indebtedness on the judgment. *Held*, (1) that the assignment being valid in Pennsylvania, was valid every where ; (2) that after the assignment the corporation had no attachable interest in the judgment ; (3) that therefore the judgment of the court of New York, which had jurisdiction only on the ground of an attachment of the corporation property, was void ; and (4) that satisfaction of it by J. S. was no bar to an action against him in Pennsylvania by the assignee of the judgment.

ACTION of debt upon a recognizance of bail in error, by the Thompson Oil Co. to the use of Brown and others against Noble and others.

It appeared that on the 25th day of November, 1867, the Thompson Oil Co. recovered judgment against the defendants for the sum of \$26,723, and two days thereafter assigned it to Brown and others for whose use this action is brought. The undertaking sued on was given on the suing out of a writ of error. The judgment was affirmed by the Supreme Court.

On the 25th of January then next the defendants, who resided in New York, were attached by an attachment there issued, as garnishees of the Thompson Oil Company at the suit of the Wood and Wright Oil Co., which claimed to be creditors of the Thompson Oil Co. The court of New York adjudged defendants liable to pay the amount of the judgment against it to the attaching creditors, and thereupon the defendants did pay the amount of the judgment, the said sum as adjudged. The Thompson Oil Co. had notice of the garnishment, but the defendants had no notice of the assignment until after the service of the attachment.

The defendants herein pleaded payment under the attachment proceedings, and plaintiffs demurred.

On the 22d of June, 1874, the judgment was entered for the plaintiffs on the demurrer, the court delivering the following opinion :

“ Our conclusions in this case are that the assignment by Thompson Oil Company to estate of Conrad Brown and others, transferred to the assignees, from the date of the assignment, all the interest of the legal plaintiffs in the judgment against Snow, Burgess, Woods and Wright, so

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that it was not attachable as the property of the Thompson Oil Company in the hands of said defendants after the date of said assignment ; that the said assignees, being non-residents of the State of New York, and actually residents in and citizens of the State of Pennsylvania, at the time of the proceedings against the said The Thompson Oil Company in the Supreme Court in and for the city and county of New York, the situs of the property follows the residence of its then owners, and was never within the jurisdiction of the courts of the State of New York, nor were the persons of said assignees, and that therefore the said Supreme Court never acquired jurisdiction of either the persons or the property of the said assignees, and any judgment of said court affecting their rights was wholly *ex parte* and invalid, and that, therefore, as a final conclusion from the foregoing conclusions, the demurrer of the plaintiffs in this case to the plea of the defendants is good and sufficient in law. We therefore direct judgment to be entered on the demurrer in favor of the plaintiffs, the amount to be liquidated from the record in the case by the prothonotary."

The judgment was liquidated at \$37,597.98.

The defendants took a writ of error and assigned for error :

1. Granting plaintiffs' motion craving oyer of the record and ordering its production.
2. Entering judgment for plaintiffs on the demurrer.

G. Shiras and *J. Fallon*, for plaintiffs in error. One compelled by a competent jurisdiction to pay a debt cannot be compelled to pay it again. *Embree v. Hanna*, 5 Johns. 101 ; *Noble v. Thompson Oil Company*, 19 P. F. Smith, 410. The only reply to a plea of a record of another State is *nul tiel record*. 1 Coke Litt. 260 ; *Benton v. Burgot*, 10 S. & R. 240 ; *Morris v. Gilbraith*, 8 Watts, 166 ; *Clark v. McComman*, 7 W. & S. 469. Oyer is not demandable of a record. 1 Troubat & Haley, 421 (863) ; Stephens on Pleading, 102. The situs of a debt is not the residence of the creditor. Personal property has no locality, and is distributable according to the *just domicilii* of the owner. *Birtwhistle v. Vardill*, 5 B. & C. 438 ; Story's Conflict of Laws, § 380 ; *Sill v. Worswick*, 1 H. Black. 665. The visible locality of a debt is the residence of the debtor, and the tribunal of that residence may exercise jurisdiction over it *in rem*. Story's Conflict of Laws ; §§ 549, 550 ; *Andrews v. Heriott*, 4 Cow. 510, in note ; *Mills v. Duryee*, 7 Cranch, 481 ; *Bissell v. Briggs*, 9 Mass. 462 ; *Armstrong v. Carson*, 2 Dall. 302. Attachment is a proceeding *in rem*, and also against the garnishee personally. *Childs v. Digby*, 12 Harris, 23 ; *Andrews v. Clark*, Carthew, 25 ; *Morgan v. Neville*, 24 P. F. Smith, 52 ; *Phillips v. Hunter*, 2 H. Black.

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402. A garnishee is protected against an equitable assignee claiming under his creditor as he would be against the creditor himself, if defendant in the attachment. *Bank of N. America v. McCall*, 3 Binn. 338, S. C., 4 id. 371; *Holmes v. Remson*, 4 Johns. Ch. 466; *Le Ohevalier v. Lynch*. Douglass, 160; *Moore v. Spackman*, 12 S. & R. 287; *Anderson v. Young*, 9 Harris, 443. A claimant to the subject-matter of a judicial controversy between others must make his claim known. *Coates v. Roberts*, 4 Rawle, 110; *Heller v. Jones*, 4 Binn. 66; *Collingwood v. Irwin*, 3 Watts, 806; *Paul v. Witman*, 3 W. & S. 409; *Govett v. Richmond*, 7 Sim. 1; Story's Conflict of Laws, §§ 389-395; Kerr on Frauds, 142; *Dearle v. Hall*, 3 Russ. 1; *Lovendge v. Cooper*, id. 30; *Neilson v. Blight*, 1 Johns. Cas. 205; *Weston v. Barker*, 12 Johns. 276; *Warren v. Copelin*, 4 Metc. 594; *Chase v. Haughton*, 16 Vt. 594; *Ward v. Morrisson*, 25 id. 593; *Richards v. Griggs*, 16 Mo. 416; *Fish v. Weston*, 5 Me. 410; *Corn v. Staaden*, 24 Ill. 320; *Green v. Van Buskirk*, 7 Wall. 139. The New York Code (Voorhees) provides: § 111. "Every action must be prosecuted in the name of the real party in interest." § 112. "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment."

J. B. Oessa and *J. O. Marshall* (with whom was *F. F. Marshall*), for defendant in error. A voluntary assignment of a chose in action valid under the laws of the place where the owner resides is valid everywhere. *Kelly v. Crapo*, 45 N. Y. 86; Story's Conflict of Laws, §§ 368, 890; *People v. Commissioners*, 23 N. Y. 192; *Guillandet v. Howell*, 35 id. 657; *Speed v. May*, 5 Harris, 94; 2 Kent's Com. 588, § 455. The situs of a debt is where the owner is. Story's Conflict of Laws, §§ 399, 411; 2 Kent, § 407; *Law v. Mills*, 6 Harris, 185. An assignment of a debt is good against a subsequent attaching creditor, even if no notice of it be given till after the attachment. *Stevens v. Stevens*, 1 Ashm. 190; *Pellman v. Hart*, 1 Barr, 263. Plaintiff in foreign attachment is in no better situation than his debtor. *United States v. Vaughan*, 3 Binn. 894; *Caskie v. Webster*, 2 Wall. Jr. 181. The court of the foreign State is bound to give the same effect to the assignment as it has in the State where it was made. Story's Conflict of Laws, § 397. The defendants in the attachment having no property at the time of the attachment in the debt, laying the attachment on their debtors in New York, did not give the court there jurisdiction, and by the order to serve the summons on them no jurisdiction was acquired. *Penna. Railroad Co. v. Pennock*, 1 P. F. Smith, 244; *Fiske v. Anderson*, 12 Abb. Pr. 8. In proceedings

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in rem, unless the court have jurisdiction over the thing, a judgment is not conclusive. Story's Conflict of Laws, § 592; 1 Greenl. Ev., § 542. A court cannot give itself jurisdiction by its own finding, so that its decision cannot be inquired into, to determine its right to decide. *Rose v. Himely*, 4 Cranch, 241; *Thompson v. Whitman*, Pittsburg Legal Journal, May 3d. 1874; *Baxley v. Linah*, 4 Harris, 249; Story's Conflict of Laws, §§ 493-495; *Kby's Appeal*, 20 P. F. Smith, 311; *Bissell v. Briggs*, 9 Mass. 462; *Border v. Fitch*, 15 Johns. 121. A plea containing no denial that the property seized was the property of plaintiffs, nor any averment that it was the property of either of the defendants in the attachment, or that it was in any other manner subject to be taken under the writ, is bad. *Buck v. Colbath*, 8 Wall. 344; *Megee v. Beirne*, 3 Wright, 50. The attachment in New York, being a proceeding not *in rem*, but *in personam*, is binding only upon parties and privies. The plaintiffs are assignees, claiming by title anterior and paramount to said proceedings, and are not barred or estopped by any thing done therein. Bigelow on Estoppel, 15, 161, 162; 1 Smith's Lead. Cas. 880; *Westoby v. Day*, 2 E. & B. 605; *Holmes v. Remsen*, 20 Johns. 229; *Perkins v. Parker*, 1 Mass. 117; *Wood v. Partridge*, 11 id. 488; *Hull v. Blake*, 13 id. 158. By the New York Code, § 122 (Voorhees'), it is provided: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in," etc. If parties, they are not brought in; their rights and interests are not affected by the determination of the court. *McMahon v. Allen*, 22 How. 193; *Shaver v. Brainard*, 29 Barb. 25; *Sturtevant v. Brewer*, 17 How. 571. The interest of a third party or conflicting claims to property cannot be tried in supplementary proceedings. Biddle's Supplementary Proceedings, 124, 150, 151; *Gardener v. Smith*, 29 Barb. 68; *Voorhees v. Seymour*, 26 id. 585; *Rodman v. Henry*, 17 N. Y. 482. An assignee is not privy to proceedings had against his assignor, subsequent to assignment. 1 Greenl. Ev., § 28 and note; *Crane v. Morris*, 6 Pet. 611; *Carver v. Jackson*, 4 id. 1; *Cossens v. Cossens*, Willes, 25. By the Constitution of the United States, judgment of another State is put upon the same footing as a domestic judgment, with the qualification that it does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given. *Baxley v. Linah*, 4 Harris, 249; Story's Conflict of Laws, 493-495; Paschal's Annotated Constitution, 214; *Steel v. Smith*, 7 W. & S. 447; *Borden v. Fitch*, 15 Johns 121; *Shumway v. Stillman*, 4 Cow. 292. When neither the par-

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ties nor subject-matter are within the jurisdiction of a court its judgment has no effect. *Eby's Appeal*, 20 P. F. Smith, 311. To such a judgment, sentence or decree, no extra-territorial effect is accorded. *Bissell v. Briggs*, 9 Mass. 462. Notice of proceedings will not give court jurisdiction. *Reel v. Elder*, 12 P. F. Smith, 308; *Pawling v. Wilson*, 13 Johns. 192; *Fenton v. Garlick*, 8 id. 194; *Scott v. Noble*, 22 P. F. Smith, 115. Judgments have not by Act of Congress full power and conclusive effect, but only *such* effect as they possess in the State whence they were taken. *Rogers v. Burns*, 3 Casey, 526; *Suydem v. Barber*, 18 N. Y. 468. When a chose in action is *bona fide* assigned it is not subject to attachment, and if judgment is obtained even after appearance of assignor, such judgment is not a bar to assignee's right of recovery. *Warren v. Lynch*, 5 Johns. 239; *Van Buskirk v. Warren*, 34 Barb. 457; *Tams v. Bullitt*, 11 Casey, 308; *Corser v. Craig*, 1 Wash. C. C. 424; *Glover v. Austin*, 6 Pick. 209; *Frazier v. Fredericks*, 4 Zab. 160; *Woodburne v. Scarborough*, 20 Ohio St. 57. Under the New York Code, § 135 (Voorhees'), the courts of that State have no jurisdiction to order service of summons on a non-resident defendant by publication unless he has property within the State when the order is made. *Fiske v. Anderson*, 12 Abb. 8. The assignees could not be bound by the proceedings in New York, unless they were brought as parties upon the record. Biddle's Supplementary Proceedings, 150; *Bostwick v. Menck*, 40 N. Y. 383; *Gardener v. Smith*, 29 Barb. 68; *Voorhees v. Seymour*, 26 id. 585; *Porter v. Williams*, 9 N. Y. 150.

The New York Code, § 122 (Voorhees'), provides: "A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order."

MEROUR, J. This suit was on a recognizance. It was entered into on the suing out of a writ of error to a judgment of the Court of Common Pleas of Erie county. That judgment was affirmed by this court. After it was recovered in the court below, and before it was affirmed here, it was assigned to Brown *et al.*, the use parties of defendant in error. About two months after that assignment, the defendants in the

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judgment were attached in the State of New York, as garnishees of the original plaintiff in the judgment. The plaintiffs in error pleaded the judgment in that attachment suit against the garnishees and their payment thereof, in bar of a recovery on the recognizance. The defendants in error demurred to the plea, and the court entered judgment in their favor.

The first assignment of error is to the court ordering the production of the record averred in the plea. It is now conceded that oyer of the record is not demandable (1 Tr. & Haley's Prac. 421); but it does not appear that any exception was taken to the action of the court at the time, nor that the plaintiffs in error were injured by its production. About a month after a copy of the record was filed, in pursuance of the order of court, the parties, by written agreement filed, waived informality in the certificate of record. The next day thereafter, on leave granted, the plaintiffs in error filed a supplemental record. Having thus voluntarily exhibited the record, the complaint of its former production cannot now be regarded.

The second assignment is to the entry of judgment in favor of the defendants in error, on the demurrer. This involves a consideration of the effect of the assignment of the judgment to the defendants in error, and also of the effect of the attachment and proceedings thereon.

First. The Thompson Oil Company was a corporation formed under the laws of this Commonwealth and doing business therein. The assignees were citizens and residents of Pennsylvania. The judgment assigned was of record in a court of this State. When the assignment was made, the assignor, the assignees, and the property assigned, were all within this Commonwealth and governed by its laws. That the assignment was for a full consideration and in good faith are unquestioned. It was a purchase, by persons having a right to buy from a party having a right to sell, of property, of which no rule or policy of law forbids the sale. It was not fraudulent, either in law or fact. It was not a statutory transfer of the judgment, but a voluntary sale and assignment of it. It was then, beyond all doubt, a valid transfer here. Being a valid assignment when and where made, it is valid everywhere. Story's Conflict of Laws, §§ 898, 899; *Speed v. May*, 5 Harris, 91; *Kelly v. Crapo et al.*, 45 N. Y. 86. It is true the assignees took the judgment subject to the equities existing between the parties thereto at the time of the assignment, and they also held it subject to any payments that might be made by the defendants therein to the assignor before notice of the assignment. By this transfer the whole property of the Thompson Oil Company in the judgment passed to the assignees. Thenceforth the oil

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company had no attachable interest in the judgment, but held it as a mere naked legal trustee of their assignees. The defendants in that judgment no longer owed or were indebted to the original plaintiff therein, but they owed it to the assignees.

Secondly. It is contended that, insomuch as the foreign attachment was served on the garnishees before they had notice of the assignment, the claim of the assignees is postponed to that of the attaching creditors. This conclusion is not sustained by the authorities in this country; among others may be cited: *Wakefield v. Martin*, 3 Mass. 558; *Dix v. Cobb*, 4 id. 512; *Van Buskirk v. Warren*, 24 Barb. 457; *United States v. Vaughan et al.*, 3 Binu. 394; *Stevens v. Stevens*, 1 Ashm. 190, *Pellman et al. v. Hart et al.*, 1 Barr. 263; *Patton v. Wilson*, 10 Casey, 299; *Speed v. May*, 5 Harris, 91; 5 Wall. 807. The reason on which these authorities rest is, that the plaintiff in a foreign attachment stands on no better footing as to the thing attached than his debtor, the defendant, whose property is sought to be seized. All that can be seized by virtue of the attachment is the property of the debtor. The original plaintiff in this judgment having disposed of it in good faith and for a valuable consideration to the defendants in error, no creditor of the assignor could set aside the assignment by proceedings in foreign attachment.

It is argued, however, that as the effect of the attachment on the assignment has been otherwise decided by the court in New York, and the garnishees have paid the debt to the attaching creditors, it establishes a good defense here for the plaintiffs in error. Article 4, section 1, of the Constitution of the United States, declares "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By the Act of 26th May, 1790 (2 Purd. Dig. 1484, pl. 1), Congress prescribed the manner of authentication, and further declared "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usages in the courts of the State from whence the said records are or shall be taken." The judgment of the court of another State is thus put on the same footing as a domestic judgment, with this qualification, that it does not prevent an inquiry into the jurisdiction of the court in which the judgment was given to pronounce it, or the right of the State itself to exercise authority over the persons or subject-matter. Story's Com. 488 and 1807; *Bissell v. Briggs*, 9 Mass. 462; *Shumway v. Stillman*, 4 Cow. 292, *Borden v. Fitch*, 15 Johns. 121; *Benton v. Burgot*, 10 S. & R.

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240; *Steel v. Smith*, 7 W. & S. 447; *Campbell v. Steele*, 1 Jones, 394; *Baxley v. Linah*, 4 Harris, 241.

We have already shown that the judgment as well as the parties to the assignment were within this State at the time of the transaction. They so continued at the time of the issuing of the writ of foreign attachment, and during the pendency of all the proceedings thereon. Neither the defendants in error, nor the judgment which they purchased, was within the State of New York. The court then had no jurisdiction of the persons or property of the defendants in error.

The writ of foreign attachment rests on the assumption that the debtor is beyond the limits of the State, but his property is within the reach of process. A judgment *in personam* is invalid unless procured after service of summons or after appearance. Without one of these the court would have no jurisdiction of the person. So if the judgment be in a proceeding *in rem* it is void if the court has no jurisdiction of the property. *Pennsylvania Railroad Co. v. Pennock*, 1 P. F. Smith, 244. Nor does the fact that the garnishees in the attachment, after judgment has been recovered against the assignor, notified the assignor and the assignee, by letter, of the pendency of the proceedings, change the result. The notice was insufficient in substance and unreasonable in time. *Erie Bank v. Gibson*, 1 Watts, 143; *Paul v. Witman*, 3 W. & S. 409; *Shimer et al. v. Jones et al.*, 11 Wright, 268. The assignees were not bound to appear on such a notice and contest the case. If they had done so, and had been admitted as parties to the suit, the case of *Moore v. Spackman*, 12 S. & R. 287, would bind them to acquiescence in the judgment. On the contrary, they waived none of their rights. They were neither parties nor privies to the suit. We give full effect to the Constitution of the United States and to the law of Congress enforcing the same. We assent to the conclusiveness of the judgment of a court of a sister State, when that court has jurisdiction, yet we cannot concede that a person resident within this State, and owning property situated therein, shall involuntarily and by such a proceeding be constructively brought within the jurisdiction of the court of another State, so as to divest his rights in that property.

The law requires us to give such faith and credit only to this record as it has by law or usage in the courts of the State of New York. As we understand the laws of that State, the judgment, so far as it is attempted to affect the defendants in error, is void there. Voorhees' U. S. Code (10th ed.), p. 114, § 122, declares, "the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when

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a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." It further declares, "when it appears that any person not a party to the action claims the same debt or property in controversy, such claimant shall be substituted of record."

This case presented the precise facts suited to the application of the Code. It was the duty of the garnishees to invoke its protection. If he chose to waive this privilege, which the law gave him for his protection, he cannot thereby throw the loss on an innocent assignee. *McMahon v. Allen*, 22 How. 193. If the garnishees had properly averred the claim of the assignees, which the record shows was known to them, the plaintiffs in the attachment would have been compelled to amend their summons and complaint so as to have made the assignees a party to the action. Nor is it a valid objection to such a course that the assignees are residents of another State. 17 How. 571. The rights of third persons can be brought into litigation only in a regular way by suit. *Rodman v. Henry*, 17 N. Y. 482. If not brought in upon service of process the court will not permit the trial to proceed to affect them. 2 Duer, 663; 5 id. 666. The judgment pleaded shows on its face that it was obtained in disregard of the laws of New York and of the rights of the assignees. No property was seized. No appearance of the defendants in error was procured. No effort was made to bring them in on process. They were not substituted of record. They were not in any sense a party to the action. Their rights as assignees were, therefore, not affected. *Roy v. Baucus*, 43 Barb. 310. The judgment rendered against one not a party to the action, before it is pronounced, does not bind him, nor is it any evidence against him. *Shuver v. Brainard et al.*, 29 Barb. 25. Want of jurisdiction may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. *Borden v. Fitch*, 15 Johns. 121; *Gage v. Hill*, 43 Barb. 44; *Bank v. Judson*, 4 Seld. 254.

The assumed hardship of paying the debt twice might readily have been avoided. The Code gave the garnishees clear and specific directions for their full protection. They studiously avoided following them. They agreed to submit the cause and all the issues therein to a referee. To his finding they filed no exceptions. This manner prevented the numerous errors in the case from being presented to the consideration of the court.

Our great respect for the learning of the judges of that court impresses us with the conviction that it was under these circumstances they per

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mitted this judgment to be recovered, and that they would hold it of no effect against the assignees, whenever properly presented for their consideration.

Hence we hold that the judgment in the attachment suit did not divest the right of property acquired by the defendants in error to the judgment in this State. That it must be so held in the State in which the judgment on the attachment was recovered as well as in this State where it was pleaded.

It follows, therefore, the learned judge was correct in entering judgment in favor of the defendant in error on the demurrer.

Judgment affirmed.

BROWN v. REED.

(79 Penn. St. 370.)

Negotiable instrument — execution of, procured by fraud — liability of maker.

The defendant signed an agreement constituting him an agent for the sale of a patented article, which agreement was so framed that a part of it could be cut off, leaving a perfect negotiable note. It was so cut without defendant's knowledge and the resulting note transferred for value to plaintiff. *Held*, that defendant was not liable in the absence of negligence, and that the question of his negligence was for the jury.

"If the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity."

ACTION of assumpsit by Reed against Brown upon the following note.

"NORTH EAST, April 8d, 1872.

"Six months after date I promise to pay to J. B. Smith or order TWO HUNDRED AND FIFTY DOLLARS, for value received, with legal interest, without defalcation or stay of execution.

"T. H. BROWN."

Indorsed: "J. B. SMITH, without recourse."

At the trial plaintiff gave the note in evidence and testified that he gave \$220 to Smith for it, in good faith, and with notice of any defect.

Defendant then offered evidence to prove that the paper he signed has been altered since so signed without his knowledge or consent, and that it was obtained from him by fraud of the payee; also, to show what took place between Smith, the payee, and himself at the time the note was

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made ; also, to show that the paper in suit is but the part of an agreement entered into between himself and one J. B. Smith, purporting to constitute the defendant an agent to sell " Hay and Harvest Grinders " in North East and Harbor Creek townships, in the county of Erie, and that the paper making him such agent has, since it was signed by him, been cut in two without his knowledge or consent, so as to make the part in evidence read as a promissory note for \$250, and that a large part of the original instrument was cut off, and that the paper in suit is not the whole of the paper signed by defendant, nor in the shape in which he signed it, but when signed by him was as follows, to wit :

*
" North East, April 3d, 1872.

" Six months after date I promise to pay J. B. Smith or bearer *fifty dollars* when I sell by order TWO HUNDRED AND FIFTY DOLLARS worth of Hay and Harvest Grinders for value received, with legal interest, without appeal, and also without defalcation or stay of execution.

" T. H. BROWN, Agent for Hay & Harvest Grinders." *
*

[The paper was divided by cutting through between where the asterisks are placed.]

The plaintiff objected to the offer, because, admitting it all to be true, it did not constitute a defense to the note in hands of an innocent purchaser for value, before maturity, and it was not alleged that the plaintiff is not such a purchaser ; nor that there was any guilty knowledge on part of the plaintiff in this case before purchase of the paper.

The offer was rejected and a bill of exceptions sealed for the defendant.

The court charged :

" There is no evidence impeaching this paper as a note in the hands of the plaintiff, and your verdict, therefore, must be for the plaintiff for the amount of note and interest." The verdict was for the plaintiff for \$280.54.

The defendant took a writ of error, and assigned the rejection of his offer of evidence and the charge of the court, for error.

/

W. Benson, for plaintiff in error. A note once issued and then altered is void altogether. *Masters v. Miller*, 4 Term Rep. 820, 846 ; *Fay v. Smith*, 1 Allen, 477 ; *Wade v. Withington*, id. 561 ; *Cock v. Coxwell*, 2 C., M. & R. 291 ; *Smith's Lead. Cas.* 934. Cutting the contract into two pieces rendered the whole contract, and hence the part held by the plaintiff, absolutely void as against the maker. 2 *Parsons on Notes and Bills*, 580-582 ; *Chitty on Bills*, 182 ; *Wheelock v. Freeman*, 13 Pick. 165 ; *Wade v. Withington*, 1 Allen,

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551 ; *Fay v. Smith*, id. 477 ; *Bruce v. Westcott*, 3 Barb. 374 ; *Dewey v. Reed*, 40 id. 16 ; *Nazro v. Fuller*, 24 Wend. 374 ; *Warring v. Early*, 2 El. & B. 763 ; *Stephens v. Graham*, 7 S. & R. 505 ; *Jardine v. Payne*, 1 B. & Ad. 671 ; *Benedict v. Cowden*, 49 N. Y. 896 ; Story on Notes, § 408 ; Byles on Bills, §§ 254, 256.

F. F. Marshall, for defendant in error, cited *Phelan v. Moss*, 17 P. F. Smith, 59 ; *Garrard v. Hadden*, id. 82.

SHARSWOOD, J. The learned counsel for the plaintiff in error has appealed to us to reconsider and overrule *Phelan v. Moss*, 17 P. F. Smith, 59 ; S. C., 5 Am. Rep. 401 ; and *Garrard v. Hadden*, 17 P. F. Smith, 82 ; S. C., 5 Am. Rep. 412 ; since followed in *Zimmerman v. Rote*, 25 P. F. Smith, 188. We mean, however, to adhere to those cases, as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is that, if the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business, before maturity. The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skillful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*, 25 P. F. Smith, 191. " It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection."

But would the facts offered to be given in evidence, and rejected by the court below, have brought this case within the line of their decisions ? We think not. In *Phelan v. Moss* and in *Zimmerman v. Rote*, the party signed a perfect promissory note, on the margin or underneath which was written a condition which, as between the parties, was a part of the contract and destroyed its negotiability. But it could easily be separated, leaving the note perfect, and no one would have any reason to suspect that it had ever existed. In *Garrard v. Hadden* the note was executed with a blank by which the amount might be increased, without any score to guard

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against such an alteration. In all these cases the defendants put their names to what were on their face promissory negotiable notes. In the case before us on the defendant's offer he did not sign a promissory note, but a contract by which he was to become an agent for the sale of a washing machine. It was indeed so cunningly framed that it might be cut in two parts, one of which, with the maker's name, would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process, so that it is impossible for any but an expert to detect it, but surely in such a case it cannot be pretended that the holder can rely upon his good faith and diligence. We think, then, that the evidence offered by the defendant below should have been received.

Judgment reversed and venire facias de novo awarded.

JARECHI v. PHILHARMONIC SOCIETY.

(79 Penn. St. 403.)

Mechanic's lien — gas-fixtures.

"Gas-fixtures," such as chandeliers, side-brackets, etc., are not subject to a mechanic's lien under an act extending the mechanic's lien law to "plumbing, gas-fitting," etc. Per SHARSWOOD, J. On the sale of a house the gas-fixtures do not go with it in the absence of an express or implied agreement to that effect. (See note, p. 80.)

SCIRE FACIAS sur mechanic's lien, issued April 2d, 1874, by Jarechi, Hays & Co., against the Philharmonic Society. The claim, amounting to \$1,060.90, was filed under the Act of April 14th, 1855, § 1 (Pamph. L. 238, 2 Br. Purd. 1027, pl. 14), extending the provisions of the Mechanic's Lien Law to plumbing, gas-fitting, and furnishing and erection of grates and furnaces.

The case was referred to B. J. Reid, Esq., as legal arbitrator, who found that the charges in the claim were "for gas-pipe — generally called gas-fittings — and chandeliers, pendants, side-brackets, lava-tips or burn

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ers, glass or porcelain globes, and some other items, commonly known as gas-fixtures, as distinguished from the term 'gas-fittings;' and the work and labor charged for were the items of work and labor expended in fitting said gas-fittings in said building and attaching them thereto and properly fitting up the said gas-fixtures." He further reported :

"The only matter in controversy is as to whether the class of materials designated under the general name of gas-fixtures, and the labor of putting them in place, can be the subject of a mechanic's lien. These disputed items amount to \$765.41, leaving the items of work and materials not disputed, amounting to only \$295.40.

"The meaning and use of chandeliers, pendants, side-brackets, tips or burners, burner-cocks and glass or porcelain globes, in connection with the lighting of the building with gas, are so well understood as to need no further description. The 'pillars' were upright pieces of gas-pipe, with casing of wood or metal, more or less ornamental in design, screwed into the supply pipes, instead of below them, or laterally, as in the case of chandeliers, pendants or side-brackets. Some of these pillars were on the exterior of the building, and some were used to light the yard, or the inclosure, attached to the building. All of these fixtures (except the globes) were screwed into the gas-pipes proper. At the close of the summer and fall season the pillars in the yard were unscrewed and 'caps' put on the openings in the pipes to prevent leakage." * * *

The arbitrator awarded to the plaintiffs the sum of \$324.60.

The plaintiffs filed exceptions to the award in the Court of Common Pleas; they were overruled and judgment entered on the award.

The plaintiffs took a writ of error, and assigned the finding of the arbitrator and the entry of judgment on the award, for error.

G. W. Lathey & Son, for plaintiffs in error.

Davenport & Griffith cited *Vaughen v. Haldeman*, 9 Casey, 522.

SHARSWOOD, J. The learned legal arbitrator below very properly considered himself bound by the authority of *Vaughen v. Haldeman*, 9 Casey, 522, and decided accordingly; but his report contains a labored argument against the judgment in that case, and we are now urged by the plaintiffs in error to reconsider and overrule it. Upon the fullest consideration, however, we have determined to adhere to it. It is frankly conceded that the Act of April 14th, 1855 (Pamph. L. 238), did not operate to extend the lien of mechanics to gas-fixtures as distinguished from gas-fittings, if a lien for the former did not exist by virtue of the Act of 1836. The distinction between the two is well stated and ex-

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plained in *Vaughen v. Haldeman*. We are not satisfied that there is any usage or general understanding contrary to that decision. Houses are considered as finished by the builders when the gas-fittings are completed. The fixtures are put up in more or less expensive style, according to the taste and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied that as between him and the landlord they are his, and he may remove them, or they may be sold as his personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is — fixtures and all — the purchaser is not entitled to them. We see, then, no reason for departing from the judgment in *Vaughen v. Haldeman*, and the opinion therein expressed upon the construction of the Act of 1855.

Judgment affirmed.

NOTE.—Mr. Ewell says, in his excellent treatise on Fixtures (p. 299): "It is perhaps settled by the weight of American authority (though the reason of the thing seems to be the other way) that the so-called gas-fixtures, consisting of gas chandeliers and burners, screwed upon the gas-pipe in the usual way are not fixtures, but mere articles of furniture, and hence do not pass upon a conveyance of the premises; though as to gas-fittings or the pipes upon which the fixtures are screwed the rule is otherwise." This doctrine is supported by *Montague v. Dent*, 10 Rich. Law, 135; *Rogers v. Crow*, 40 Mo. 91; *Shaw v. Lenke*, 1 Daly, 487; and see *Laurence v. Kemp*, 1 Duer, 363; Tyler on Fixtures, 396, *et seq.*; Brown on Fixtures, Appendix A.

Where, however, it is the intent of the parties that the gas-fixtures shall pass on a sale, that intent will govern. Thus, where during a negotiation for the sale of a house, the owner, as an inducement to defendant to purchase, informed him that "the house was complete and ready for him to move into and all that he had to do was to walk in and light the gas, as it was complete," it was held that this was evidence of an intent to have the gas-fixtures pass with the house. *Funk v. Brigaldi*, 4 Daly, 359.

As to what fixtures pass and what do not on the sale of a house, see Ewell on Fixtures, 374 *et seq.* where the cases are carefully collected.—RER.

MENTZ V. ARMENIA FIRE INSURANCE CO.

(79 Penn. St. 478.)

Fire insurance — condition in policy as to arbitration to ascertain loss

A policy of insurance against fire was conditioned that in case of difference between the assured and the company touching the amount of any loss such difference should be submitted to arbitrators, whose decision should "be final and conclusive," and no action was to "be maintained on the policy unless the amount of loss or damage in

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case of difference or dispute shall be first ascertained." *Held*, (1) that the condition did not oust the court of jurisdiction of an action on the policy, and (2) that, if the condition was of any effect, the company must show that they admitted the validity of the policy and their liability under it, and that the only question was as to the extent of the loss.

ACTION of assumpsit on a policy of insurance against fire issued by the defendant on a stock of goods in plaintiff's store, which goods were burned during the life of the policy. The policy was conditioned, among other things, as follows:

"In case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him, such difference shall be submitted to the judgment of arbitrators, one to be appointed by each party, with power to select a third in case of disagreement, whose decision thereupon shall be final and conclusive; and no action, suit or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or damage in case of difference or dispute shall be first thus ascertained."

On the trial the defendants moved for a nonsuit, "because the section above requires the parties to the policy to submit to a reference," etc.

The plaintiff objected to the motion, because no reference was offered or asked for. By direction of the court judgment of nonsuit was entered.

This was assigned for error, on the removal of the record to the Supreme Court, by the plaintiff by writ of error.

H. C. Johns, for plaintiff in error. A general covenant or agreement providing for settling disputes by arbitration, without naming the arbitrators, does not take away the jurisdiction of the courts. *Gray v. Wilson*, 4 Watts, 41; *Lauman v. Young*, 7 Casey, 310; *Snodgrass v. Gavit*, 4 id. 224; *Ins. Co. v. Morse*, 20 Wall. 445.

J. B. Brawley, for defendant in error.

SHARSWOOD, J. There can be no doubt that, if this case stood upon a general arbitration clause in the policy alone, it would fall within the principle settled by this court, conformably to all the previous English authorities, in *Gray v. Wilson*, 4 Watts, 41; *Snodgrass v. Gavit*, 4 Casey, 224, and *Lauman v. Young*, 7 id. 310; that it is not in the power of the parties to a contract to oust the courts of their jurisdiction.

The cases in which the certificate or approbation of any particular person — as the engineer of a railroad company — to the amount of a claim, is made a condition precedent to an action, rest upon entirely dif-

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ferent principles. He is not created a judge or arbitrator of law and facts, but simply an appraiser of work done. *Monongahela Nav. Co. v. Fenton*, 4 W. & S 205; *Lauman v. Young*, 7 Casey, 306. In all these cases there is an actual reference, founded upon consideration, and therefore irrevocable. That which is before us is a mere agreement to refer to arbitrators to be chosen at a future time.

Such an agreement, like any other agreement of reference, is revocable, though the party may subject himself to an action of damages for the revocation. It is not in the power of parties thus to oust the courts of their general jurisdiction, any more than they have to add to a personal covenant, that they are not to be responsible for a breach of it. *Furnivall v. Coombes*, 5 Mann. & Gr. 736. The Supreme Court of the United States have recognized the soundness of this general principle in *Insurance Co. v. Morse*, 20 Wall. 445, in which they held that an agreement by a foreign insurance company, in conformity with a State statute, that if sued in a State court they would not remove the suit into the Federal court, was invalid.

The contention, however, here is, that the special provision added in this policy to the arbitration clause distinguishes this case from those cited. It declares that "no action, suit, or proceedings at law or in equity, shall be maintained on this policy, unless the amount of loss or dispute as aforesaid shall have been first thus ascertained."

If, however, it was not in the power of the parties to oust the courts of their general jurisdiction, by such an agreement, that clause does not help them. Had a general arbitration clause been valid, it would have been a condition precedent to an action of itself; the provision in question is but the expression of that which was implied.

We are not to be understood as holding that this provision of the policy, which is special, not general, is entirely without effect. By its terms it was confined to "any difference or dispute that should arise between the insured and the company, touching the amount of any loss or damage." But then it was incumbent on the defendants below, in order to avail themselves of it, to show that a dispute had arisen touching the amount of the loss. In other words, they must show that they admitted the validity of the policy, and their liability under it, and that the only question was as to the extent of the loss.

An examination of the case of *Scott v. Avery*, 5 House of Lords Cases, 827, so much relied on by the defendants in error, will show that a majority of the opinions there went upon the ground that it was a special, not a general arbitration, which was intended. The power to oust the courts of their general jurisdiction was expressly repudiated

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Nothing of the kind appeared on the trial here ; on the contrary, it rather seemed, from an offer of evidence made by the plaintiff, objected to by the defendants, and rejected, that one ground of defense was, that there had been a breach of one of the conditions of the policy, by the non-indorsement of another insurance, which avoided the contract altogether.

Parties may agree that when the dispute is of the character of an account involving the examination of books, and the value of a large number of things, and the extent of the damage, it shall be determined by three men as appraisers in effect — a much more appropriate tribunal for such a controversy than a jury.

Judgment reversed and procedendo awarded.

HUNTER v. COMMONWEALTH.

(79 Penn. St. 503.)

Criminal law — indictment for felony — conviction of lesser crime.

Defendant was indicted for an assault with intent to kill. *Held*, that he could be convicted of a simple assault. *

INDICTMENT against defendant and another for that they, “with force of arms, feloniously did make an assault upon one Samuel Floyd, etc., * * * and that the said James A. Hunter in his right hand then and there had and held (a pistol, and) feloniously did then and there shoot at the said Samuel Floyd with intent, him, the said Samuel Floyd, then and there feloniously to kill and murder. And that the said Agatha Hunter, at the time of the committing of the felony and assault aforesaid, etc., * * * was there present, aiding, helping, abetting, assisting, comforting and maintaining the said James A. Hunter in the felony and assault aforesaid, in manner and form aforesaid, to do, commit, and perpetrate. And so the inquest aforesaid, etc., do say that the said James A. Hunter and the said Agatha Hunter then and there, in manner and form aforesaid, feloniously did shoot at the said Samuel Floyd with intent, him, the said Samuel Floyd, then and there feloniously to kill and murder, contrary to the form of the Act of the General Assembly,” etc.

The indictment was tried November 28d, 1874, and the jury found ‘the defendants, James A. Hunter and Agatha Hunter, guilty of an

* See *State v. White*, 20 Am. Rep. 602.

assault." On the 28th November, 1874, the defendants moved in arrest of judgment, for the following reason :

"That the indictment, containing but one count, charged a felony, of which offense the jury acquitted, but found defendants guilty of a misdemeanor, upon which finding no judgment can be entered, because the greater offense contains the lesser, and the latter was merged in the former ; because there is no statute authorizing it ; no decision of the Supreme Court changing the common law and practice, and at common law, both in England and here, no such judgment could be entered on such a finding."

On the 2d of January, 1875, the motion was overruled and James A. Hunter was sentenced to pay a fine of \$200 and be imprisoned for ten months. James A. Hunter took a writ of error, and assigned for error that the court erred :

1. In overruling defendant's motion in arrest of judgment.
2. In holding that a conviction could be had for a misdemeanor in an indictment charging a felony alone.

J. S. Ferguson, M. Swartzwelder, and R. M. Gibson, for plaintiff in error, cited *Henwood v. Commonwealth*, 2 P. F. Smith, 424 ; *Stevick v. Commonwealth*, 28 id. 460 ; *Commonwealth v. Gable*, 7 S. & R. 433 ; *Dinkey v. Commonwealth*, 5 Harris, 129. The offense charged being a felony under the Criminal Code of March 31, 1860, § 82 (Pamph. L. 403, 1 Br. Purd. 340, pl. 128), the defendant would be prevented from testifying under Act of April 3d, 1872, § 1 (Pamph. L. 34, 1 Br. Purd. 625, pl. 21).

T. M. Marshall, for Commonwealth, defendant in error.

PAXSON, J. The plaintiff in error was indicted for a felonious assault. The jury convicted him of assault. A motion in arrest of judgment was made, which was overruled by the court below, and judgment entered on the verdict. This is assigned here for error.

The record presents the single question, whether, upon an indictment charging a felony, the jury may acquit of the felony, and convict of the constituent misdemeanor. We are in no doubt as to the rule at common law. It was long held in England, that upon an indictment for a felony there could be no conviction for the minor offense of misdemeanor. *Ret v. Cross*, 1 Ld. Raym. 711 ; S. C., 3 Salk. 193 ; 2 Hawk., chap. 47, § 6 : 1 Chit. C. L. 251 and 639. The reason of the rule was, that persons indicted for misdemeanors were entitled to certain advantages at the trial, such as the right to make a full defense by counsel ; to have a copy

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of the indictment, and a special jury, privileges not accorded to those indicted for a felony. It is apprehended these reasons no longer exist in England — at least not to the extent they did formerly, for by the stat. 1 Vict., ch. 85, § 11 (Lord Denman's Act), the rule itself has been abolished, and now, upon a bill charging a felony, a conviction may there be had for a constituent misdemeanor. It is clear that the reason of the rule has no application in this State. On the contrary, the advantages, if any, upon the trial are all in favor of those charged with a felony. By the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused, and the more jealously does the law guard every legal right to which he is entitled.

The rule in other States of this country is by no means uniform. It is said by Mr. Wharton, in his work on Criminal Law, § 400, that the old common-law rule is still followed in Massachusetts, in Indiana and Maryland; while in New York, Vermont, New Jersey, Ohio, North Carolina, South Carolina and Arkansas, it has been held that the reason of the English rule having ceased, the rule itself ceases, in obedience to the maxim *cessante ratione legis cessat ipsa lex*. A number of authorities are introduced by Mr. Wharton, which it is unnecessary to refer to here. The learned author places Pennsylvania as among the States in which the old common-law rule still prevails, and cites *The Commonwealth v. Gable*, 7 S. & R. 438, in support of his text. The case referred to is authority only for what it decides. No such question was before the court. The contention there was whether upon an indictment for murder a conviction for manslaughter, without stating it was for voluntary manslaughter, could be sustained. The court held that the verdict was sufficiently certain; that it was to be presumed the jury meant voluntary manslaughter. It is true, C. J. TILGHMAN, who delivered the opinion of the court, recognized the common-law rule referred to, but it was assumed, not argued. Indeed, it could not well have been otherwise, as the point was not made. BLACK, C. J., also appears to have recognized the rule in *Dinke v. The Commonwealth*, 5 Harris, 127, when he said that, "on an indictment for a felony, there cannot be a conviction for a minor offense included within it, if such minor offense be a misdemeanor." But this point was not before the court in *Dinke v. Commonwealth*. All that case ruled was, that an indictment for seduction under the statute includes the charge of fornication, and that a party indicted for seduction and acquitted may plead such an acquittal in bar of the subsequent indictment for fornication and bastardy on the same act; and the record will be a complete defense. It will thus be

seen that *Dinke v. The Commonwealth*, as well as *Commonwealth v. Gable*, are not authority to the extent claimed for them, and can hardly be said to support the rule. On the other hand, we are not without authority to support a conviction of a misdemeanor upon an indictment charging a felony. In *Harman v. The Commonwealth*, 12 S. & R. 69, in which it was held that a count charging assault with intent to ravish might be joined with a count for rape, C. J. TILGHMAN shows that as far back as 1772, upon an indictment charging rape, the defendant had been convicted of an assault with intent to ravish. In *Shouse v. The Commonwealth*, 5 Barr, 83, the principle is laid down by BURNSIDE, J.: "When a count in an indictment contains a divisible averment, it is the province of the jury to discriminate and find the divisible offense: and this distinction runs through the whole criminal law. It is enough to prove so much of the indictment as shows that the defendants, or any one of them, has committed a substantial crime therein specified." Justice BURNSIDE then proceeds to cite *Rex v. Dawson*, 3 Starkie, 62, where an indictment charged the defendant with an assault with intent to abuse and carnally know a female child, and it was held that he might be convicted of an assault to abuse her simply: 5 Ohio, 242, where it was held that on an indictment for an assault with an attempt to murder, there may be a conviction of an assault simply; and adds: "this is the law and practice of Pennsylvania." The general rule is well settled that, upon an indictment charging a particular crime, the defendant may be convicted of a lesser offense included within it. Thus upon an indictment for murder the prisoner may be convicted of manslaughter; a person charged with burglary may be convicted of larceny, if the proof fail of breaking and entering; a person charged with seduction may be convicted of fornication. *Dinke v. Commonwealth*, 5 Harris, 127; when persons are indicted for riotous assault and battery, they may be convicted of assault and battery only. *Shouse v. Commonwealth*, 5 Barr, 83; when the charge is assault and battery, a conviction may be had for assault. Instances of this kind might be multiplied indefinitely if necessary.

The common-law rule that a felony and misdemeanor cannot be joined in the same indictment had its foundation in substantially the same reasons as the rule under discussion. Yet we have seen that it was departed from in *Harman v. The Commonwealth*. Since then it has been constantly undermined. In *Henwood v. The Commonwealth*, 2 P. F. Smith, 424, it was said by AGNEW, J., that "the English rule against the joinder of a felony and misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in case except it is

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where the offenses are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage," citing *Reg. v. Ferguson*, 29 Eng. L. & E. 536; *Harman v. Commonwealth*, *supra*; *State v. Hooker*, 17 Vt. 658; *State v. Boyes*, 1 McMullin, 190, and other cases. I regard it, therefore, as the settled rule in this State, that a felony triable in the Quarter Sessions may be joined in the same indictment with a misdemeanor growing out and a part of the same transaction. Whether a misdemeanor may be joined in the same indictment with a felony which is triable exclusively in the Oyer and Terminer is a question about which I express no opinion, as the principle is not necessarily involved in this case.

If the indictment here had contained a count charging assault merely, it is clear from the above authorities that there would have been no misjoinder. It is equally clear that a conviction for the assault and an acquittal for the felony would have been good. So would a conviction upon the bill generally. If, then, there could have been a conviction upon the count for assault, why not without the count? We have seen that the rule against the non-joinder of the two offenses no longer exists. What is there left to support the position that upon the charge of felony a conviction cannot be had for its constituent misdemeanor? In this case the defendant was indicted for an assault with an intent to kill. He was convicted of an assault. This was the very offense with which he was charged. The intent to kill is a mere qualification or aggravation of the crime. The fact to be proved by the Commonwealth was the assault. It was for the jury to say whether, under the circumstances attending the assault, the nature of the attack, and the means employed, it was accompanied with an intent to take life. Upon the question of the intent, the jury have found in favor of the defendant, but convicted of assault. How has he been injured by this? The greater crime necessarily involved the less. It was divisible. The lesser could exist without the greater, and the jury have so found. There was no surprise upon the defendant. The fact of the assault was the very issue before the jury, and he enjoyed every legal right incident to the trial that he would have been entitled to if he had been indicted for the misdemeanor. Nor is he left in any peril hereafter. The plea of *autrefois convict* would be a sufficient answer to a subsequent indictment for the misdemeanor.

It was strongly urged, however, as a reason why this conviction should not be sustained, that the defendant was deprived of the benefit of the Act of April 3d, 1872, which permits defendants charged with offenses not above the grade of misdemeanor (forgery and perjury excepted) to testify in their own behalf. The objection is plausible, but

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unsound. The act in question may be regarded as an indulgence extended to defendants in certain cases. It was not intended to embarrass or delay the administration of criminal justice, nor to make two trials necessary where one sufficed before. It is not to be extended to cases not enumerated in the act. It has no application where a party is charged with a felony. Such was the charge here. It is true the result of the trial shows the defendant did not commit the felony. But that was one of the questions of fact the jury were called upon to try. In the determination of such an issue the defendant had no right to be heard from the witness-stand. Had the indictment included a count for the assault it cannot be pretended that the defendant would have been a competent witness. And if convicted of the misdemeanor only, it would not have been a sufficient ground to arrest the judgment. If it be urged that this view of the effect of the Act of 1872 may lead to cases of hardship, it is sufficient to say that the remedy for such cases is in the courts below. If a count for a felony is joined in an indictment with a count for a misdemeanor for the mere purpose of closing the mouth of the defendant, the judge before whom the cause is tried has ample power to see that the process of the law is not abused. It is not to be presumed that public officers charged with the prosecution of the pleas of the Commonwealth will use the powers they possess to the injury of the citizen.

The common law bristles with technicalities. It was said by Lord HALE, an eminent as well as a humane judge, that such niceties "were grown to be a blemish and an inconvenience in the law, and the administration thereof; that more offenders escape by the easy ear given to exceptions to indictments than by the manifestations of their innocence, and the grossest criminals had gone unpunished by reason of these unseemly niceties." Many of the niceties to which Lord HALE alluded survived long after the reasons in which they had their origin had passed away. But few of them remain to vex the administration of justice. The tendency of modern legislation and of judicial decision is to disregard mere technicalities, and to regard the substance rather than the form. Our revised Criminal Code and Criminal Procedure Act have brushed away many of these "unseemly niceties." Among these changes may be noticed section 107 of the Code, defining the offense of larceny by any clerk, servant, or person in the employ of another, where the property stolen has never gone into the actual possession of the owner; section 108, in regard to larceny by bailees, where the bailee shall not break bulk, or otherwise determine the bailment; also sections 11 to 22 of the Criminal Procedure Act, relating to indictments and pleadings, allowing

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the amendment of indictments in mere formal matters; simplifying the forms of indictments, so that it is sufficient to charge the offense substantially; and sections 50 and 51 of the last-named act, in the former of which it is provided that a party indicted for felony or a misdemeanor may be found guilty of an attempt to commit the same; and in the latter, that persons indicted for a misdemeanor shall not be acquitted, if upon the trial the offense turns out to be a felony. The last-named sections have an important bearing upon the question under consideration. The analogy is so close that we might safely rest our decision upon it. The statute having made it the duty of the jury to convict of an attempt where the proof fails of the completed offense, it is difficult to see any sufficient reason why a conviction may not be had for a completed misdemeanor, when the proof fails of the perpetration of the felony of which it is a constituent.

In the Quarter Sessions of Philadelphia, the most important criminal court in the State, the English rule has long since been abandoned. So far as I have means of knowledge the same is the case throughout the State. While this is not conclusive, it is yet important, as showing the drift of the judicial and professional mind.

In view of all these facts, and of the authorities cited, we have no hesitation in declaring that the old common-law rule, that upon an indictment for a felony there can be no conviction for a misdemeanor, no longer exists in Pennsylvania.

The judgment of the Court of Quarter Sessions is affirmed.

 THORNE V. TRAVELLERS INSURANCE COMPANY.

(80 Penn. St. 15.)

Insurance company — appointment of agents by foreign company — failure to comply with statute defense to action on agent's bond.

In an action on a bond given by the agent of an insurance company incorporated in another State, to recover moneys collected as premiums, *held*, that it was a good defense that the plaintiff had not complied with the statutes of the State in appointing said agent, and that said agent had not qualified himself to act as such statutes required.

ACTION of debt by the Travellers Insurance Company of Hartford, Connecticut, against Thorne and others on a bond given by said Thorne as principal and the others as sureties. The opinion states the

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case. The plaintiff had a verdict, and the defendant took a writ of error.

Wier & Gibson, A. M. Brown and S. A. Purviance, for plaintiffs in error. An action founded on the violation of law cannot be maintained. *Maybin v. Coulon*, 4 Dallas, 298. The test is, whether the plaintiffs require the aid of the illegal transaction to establish their case. *Swan v. Scott*, 11 S. & R. 161; *Thomas v. Brady*, 10 Barr, 164; *Scott v. Duffy*, 2 Harris, 20. When an act is prohibited under a penalty it is void. *Burkholder v. Beetem*, 15 P. F. Smith, 496; *Holt v. Green*, 28 id. 198; *Armstrong v. Toler*, 11 Wheat. 258; *Craig v. Missouri*, 4 Pet. 426; *Roby v. West*, 4 N. H. 285; *Pray v. Burbank*, 10 id. 377; *Bancroft v. Dunmas*, 21 Vt. 456; *Boutwell v. Foster*, 24 id. 485. In relation to liability on contracts, etc., of insurance companies who have not complied with statutory requisitions, they cited *Aetna Ins. Co. v. Harvey*, 11 Wis. 414; *Buxton v. Hamblen*, 82 Me. 448; *Gibson v. Service*, 5 Taunt. 488; *Lindsey v. Rutherford*, 17 B. Monr. 245; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

S. M. Raymond, C. B. M. Smith, and A. H. Miller, for defendants in error.

MERCUR, J. Although twenty-seven errors were assigned, eight only were urged on the argument. The main contention in the case arises under the 4th, 5th, 6th, 7th and 8th assignments. They will be considered together. They raise the question of the effect upon the rights of the defendants in error, on their failing to comply with the requirements of the Act of 11th April, 1868. *Purd. Dig.* 796, pl. 28.

The defendants in error are a foreign life and accident insurance company, organized under the laws of the State of Connecticut. Thorne had been acting as an agent for the company in the western part of Pennsylvania. This action was on a bond, executed by himself and sureties, conditioned, *inter alia*, that he should pay over to the company the premiums or money received by him, for it, from any source. The claim was to recover premiums received and retained by him. The bond is dated 25th of July, 1870. He ceased to act as agent the 5th of November of the same year. He is sought to be charged with money received by him as agent for the company during the intervening time.

The Act of 11th April, 1868, is designed to establish a complete system, under which alone such a company, incorporated in another State, can transact business in this State.

Section 2 requires the company shall first appoint an agent resident

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within this State, and file in the office of the auditor-general a certified copy of the resolution appointing him.

Section 5 requires the agent to give a bond with sureties in the sum of \$5,000, conditioned for the faithful discharge of all the duties enjoined on him by the act. The bond shall be duly approved and recorded, and then be deposited in the office of the auditor-general.

Section 10 gives such agent power to transact business in every county of the Commonwealth, either in person or by subordinate agents appointed by him, and he "may from time to time appoint as many subordinate agents as he may deem proper, and certify the names and residences of the same to the auditor-general, who thereupon shall issue to each of said subordinate agents, upon payment of the usual fee of his office, a certificate showing that * * * the agent has full power and authority to transact business in any part of this Commonwealth, and that he has designated such person as his subordinate agent; and no person shall act as a subordinate agent until he has received such certificate." Thus it appears a subordinate agent cannot be appointed otherwise than through and by this certificate of the auditor-general. Without such certificate he is absolutely forbidden to act by the most positive and imperative language.

Section 12 prescribes the punishment which shall be inflicted on any person who shall receive premiums, forward applications, or in any way transact business for the company, without having received authority so to do, agreeably to the provisions of the act. It declares "he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined \$500 for each offense." The penalties given by this section are not limited to those illegally acting as agents, but extend to the company thus suffering them to act. It declares any party receiving applications from, or sending policies to, any person not duly authorized to act as agent, shall be fined in a like sum of \$500 for each offense and be prohibited from doing business in this State until the fine is fully paid.

Section 13 enjoins upon the district attorneys of the several counties the duties of examining every licensed agent transacting business in their respective counties; and the books of said agency, "once in each and every year," and to enforce this act and all of its penalties against such agents, persons and companies as may offend against its provisions.

If Thorne was not duly qualified under the statute to act as agent, but did so act under instructions from the company, both he and the company were acting in violation of the express commands of the statute. If so acting, can the company sustain this suit, based on such an illegal transaction?

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There can be no doubt of the constitutional power of the legislature to prescribe the conditions under which a foreign corporation shall transact business in this State, and the manner in which its agents shall be qualified, before entering on their duties.

It has often been held that an action founded on a transaction prohibited by statute cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared that the contract be void. *Mitchell v. Smith*, 1 Binn. 118; *Seidenbender et al. v. Charles' Administrators*, 4 S. & R. 151; *Swan v. Scott*, 11 id. 155; *Columbia Bridge Co. v. Haldeman*, 7 W. & S. 233; *Thomas v. Brady*, 10 Barr, 164; *Scott v. Duffy*, 2 Harris, 20; *Holt v. Green*, 23 P. F. Smith, 198. In this last case it was said, the objection may often sound very ill in the mouth of defendant; but it is not for his sake the objection is allowed. It is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral or an illegal act. It is claimed, however, that conceding the rule that an illegal contract will not be enforced by a court, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied; and the court will not unravel the transaction to discover its origin. We may concede this view of the law to be correct, as an abstract proposition; yet it by no means controls this case. This is not an action against Thorne alone, for money had and received. It is against him and his sureties jointly, on their bond, for his alleged breach of duty as a duly appointed agent of the corporation. That he had been "duly appointed" is recited in the bond to which they subscribed their names as sureties. They had no knowledge of the illegal conduct of Thorne or of the corporation. They were no party to any fraud. They had violated no provision of the statute. They have done nothing to estop their showing the whole character of the consideration on which the bond rests. Still further, the defendants in error did not seek to recover by giving the bond alone in evidence. They went further and opened up the whole transaction between themselves and Thorne. Without the aid of that transaction the company had no case. If the transaction was illegal, then the corporation itself showed it had broken the law, and that it could not recover without the aid of the illegal consideration — of one prohibited by statute. The sureties might undoubtedly invoke the protection of the law to relieve them from an obligation based on an illegal consideration, and

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entered into on a false representation of a substantial and controlling fact. *Horbach v. Gray*, 8 Watts, 497; *Miles v. Stevens*, 3 Barr, 21.

[The remainder of the opinion was devoted to questions of evidence.]
Judgment reversed.

COLEMAN V. CHADWICK.

(80 Penn. St. 81.)

Mining — support of surface — custom — loss of springs.

The owner of land conveyed the coal beneath the surface "and all the privileges necessary for the convenient working of said coal * * * and all rights and privileges incident or usually appurtenant to the working and using of coal mines." *Held*, that the grantee could not remove the surface support, and that evidence of a custom to the contrary was not admissible.

The grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine.

ACTION on the case by Chadwick against Coleman and others to recover damages occasioned to plaintiff's land by defendants in working a coal mine.

The plaintiff declared that he was the owner of a tract of sixteen acres of land in Penn township, Allegheny county, on which he with his family resided; that the defendants were possessed of a coal mine underlying the said tract of land; that it was their duty in working the mine to leave sufficient pillars, ribs, supports, etc., so as to prevent the superincumbent surface of the said tract from falling in, or to have set up sufficient posts to support and protect the surface and prevent it from falling in; that the defendants mined the coal in so unskillful, negligent and careless a manner as to cause the surface of the tract overlying the mine "to cave in, crack, break and thereby destroy the buildings, orchards, springs of water, etc., and diverted the springs and streams of water from their natural channel, etc., so that the plaintiff was not only disturbed in his possession, use, etc., of the tract, but injured in his occupation as farmer and fruit-raiser."

The tract of land, surface and minerals beneath, on the 4th of October, 1853, belonged to Thomas Chadwick, who, on that day, conveyed to the firm of Coleman, Hailman & Co., "all the bituminous and fossil coal within and underlying" the tract in question; "containing an area of coal of 40 acres and 145 perches, with the privilege of entering on

and occupying so much of the overlying land as might be necessary for opening mines, adits, drains, etc., and for constructing ways, roads, etc., and all the privileges necessary for the convenient working, transportation, etc., of the coal, etc., and 'all rights and privileges incident or usually appurtenant to the working and using of coal mines.' " The rights of the grantees under the foregoing conveyance were afterward vested in the defendants. After the death of Thomas Chadwick, by proceedings in partition of his estate, the plaintiff, as one of his sons and devisees, became the owner of the part of the tract, the injury to which part is complained of in this suit.

The plaintiff's evidence tended to support the declaration. The defendants offered evidence that at the date of the conveyance and prior thereto, it was the universally approved, established and customary course and practice of mining coal in the vicinity of plaintiff's land, to mine and remove all coal without leaving ribs or other support for the surface, and that defendants had mined in accordance with this custom, and that it was impossible to mine there without interfering and causing a subsidence of the surface.

The jury found a verdict of \$1,700 for the plaintiff, of which \$1,000 was for losses of springs; but if the court in banc thought such loss ought not to be allowed, then the plaintiff was to have \$700.

Each party took a writ of error.

J. Fitzsimmons, for plaintiff below. If an owner of the whole estate have alienated the minerals, reserving the surface, he is not presumed to have parted with the right to support of the surface. *Bainbridge on Mines*, 380; *Jones v. Wagner*, 16 P. F. Smith, 429; *Dugdale v. Robertson*, 3 Kay & J. 695; *Humphries v. Brogden*, 1 Eng. Law & Eq. 241; *Wakefield v. Buccleuch*, Law Rep., 4 Eq. 613; *Glasgow v. Hurler and Campsie Alum Co.*, 8 Eng. Law & Eq. 18. Where general words in a contract follow particular recitals, they are to be construed as applicable to subjects *ejusdem generis*. *Parsons on Contracts*, 501, note u; 500, note r. The right of support to the surface cannot be taken away by words of doubtful meaning. *Bainbridge on Mines*, 433; *Proud v. Bates*, 5 Am. Law Reg. (N. S.) 171; *Shaw v. Stenton*, 28 L. J. Exch. 253. Where a particular clause in a deed granting certain rights respecting persons or things of an inferior class, followed by a general clause, such clause will not grant rights to persons or things of a superior class. *Doe v. Meyrick*, 2 Crompt. & J. 223; *Jackson v. Stevens*, 16 Johns. 110 *Queen v. Nevill*, 8 Q. B. 452.

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The springs of water cannot be dissevered from the soil ; all are considered real estate. 1 Co. Litt. 3 b, 4 a, § 1 ; *Cadwell v. Fulton*, 7 Casey, 483. The defendants had no right to disturb plaintiff's right to his flow of water. *Acton v. Blundell*, 12 M. & W. 336 ; *N. A. Railroad Co. v. Peterson*, 14 Ind. 112 ; Washburn on Easements, 365, 378, 450, 456, 460 ; *Smith v. Kenrick*, 7 C. B. 515. Each contiguous proprietor has absolute control of the water within his own premises. *Wheatley v. Baugh*, 1 Casey, 533 ; *Dexter v. Providence*, 1 Story, 387 ; 2 Hilliard on Real Prop. 105 ; *Hill v. Newman*, 5 Cal. 445. A subterranean spring cannot be diverted by the owner of the land above, to the injury of those using the water. *Smith v. Adams*, 6 Paige, 435 ; *Balston v. Benstead*, 1 Campbell, 463 ; *Whitehead v. Parks*, 2 Hurlst. & Norm. 870. A spring is a water-course which, after leaving the opening, cannot be diverted. *Gillett v. Johnston*, 30 Conn. 180.

M. W. Acheson, for defendants below. The deed from Chadwick was a sale of all the coal and the right to mine it ; by the contract the whole coal may be devoted without leaving support. *Jones v. Wagner*, 16 P. F. Smith, 429. Proof of usage is admissible to interpret a contract. 1 Greenl. Ev., §§ 292, 294 ; 2 Parsons on Contr. 49 ; *Dwight v. Whitney*, 15 Pick. 179 ; *Stultz v. Dickey*, 5 Binn. 286 ; *Aughingbaugh v. Poppenheffer*, 5 P. F. Smith, 347 ; Taylor's Landl. and Ten., §§ 350, 538, 554 ; *Van Ness v. Pacard*, 2 Pet. 137 ; *McCullough v. Irvine*, 1 Harris, 438. As to the loss of springs he cited *Wheatley v. Baugh*, 1 Casey, 528 ; *Whetstone v. Bowser*, 5 id. 59 ; *Haldeman v. Bruckhart*, 9 Wright, 514 ; *Ballacorkist Mining Co. v. Harrison*, 29 L. T. (N. S.) 658.

GORDON, J. We have held in the case of *Horner v. Watson*, 29 P. F. Smith, 42 (*ante* 55), decided at the present term, approving *Jones v. Wagner*, 16 id. 429, that of natural right the surface land is entitled to support from the strata below, and that, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil, and that the plea of a custom to the contrary could not be entertained, because such a custom would be unreasonable, and hence wanting in an element essential to its validity. To the opinion in that case we refer for the reasoning intended to sustain that conclusion. It is admitted, however, that, as a man may do what he pleases with his own, he may, by grant, part with the right of surface support, and it is contended that such is the purport of the deed of Thomas Chadwick and wife to

Coleman, Hailman & Co. That part of the aforesaid deed, which is supposed to release such right, reads thus : " And all the privileges necessary for the convenient working, running and transportation of said coal, and deposition of excavated matter, and also all rights and privileges incident or usually appurtenant to the working and using of coal mines." But we cannot perceive that this grant in any way compromises the grantor's right of surface support. If, indeed, the destruction of the superincumbent estate be one of the privileges necessarily incident and appurtenant to coal mining, then the said indenture does convey the right contended for. As, however, we have just determined that such destruction of the surface is in no way incidental to such mining, we must necessarily refuse our assent to the construction contended for. It is in effect but another form of a plea of a general custom or usage permissive of the removal of all subjacent support. For it is argued, that when the vendor used the words " all rights and privileges incident or usually appurtenant to the working and using of coal mines," he did so in view of such custom, as above referred to, and that his covenant must be interpreted accordingly. The answer to all this is, that as no such custom could have existed, because of its unreasonableness, it could not have entered into the contract of the parties. Support is part and parcel of the reserved estate ; it is of common right, and hence must pass, if at all, by express grant, and is not to be defeated by mere implication arising from language that does not import such an effect.

We think the whole question is determined in the negating of the custom contended for, and hence the judgment of the District Court must be sustained.

We also affirm the same judgment in the writ of error brought by James M. Chadwick.

So far as we can judge from the record presented to us, the loss of the plaintiff's springs was occasioned by the ordinary operation of mining, and would have occurred though no part of the surface had been broken. Mining must interfere more or less with those subterranean streams and percolations of water which appear upon the surface as springs ; to say that the owner of the substrata shall be accountable in damage for their disturbance, is to say that he shall have no use whatever of his minerals, for, without interfering to some extent with such waters, mining is impossible.

Judgment affirmed.

WILLIAMS and MERCUR, JJ., dissented.

Philadelphia & Reading Railroad Co. v. Hendrickson.

PHILADELPHIA & READING RAILROAD CO. v. HENDRICKSON.

(80 Penn. St. 182.)

Negligence — of railroad in setting fire to adjoining property — contributory negligence.

In an action against a railroad company for negligently burning property adjoining its line, *held*, that the company's negligence being proved, and that the loss arose from it, the condition of the plaintiff's property is no defense.

Plaintiff's barn, near defendant's line, was negligently burned by sparks from the locomotive. *Held*, that it was no defense to an action for the damages that the roof of the barn was in such condition as to be liable to take fire.

ACTION on the case by Hendrickson against the Philadelphia & Reading R. R. Co., to recover damages alleged to have been occasioned to plaintiff through defendant's negligence.

The defendants were lessees of the Catawissa Railroad which ran through plaintiff's farm and about sixty feet from his barn. On April 24, 1873, a freight-train passed plaintiff's barn about six o'clock, P. M., and shortly after the barn was discovered to be on fire and was entirely consumed. The plaintiff claimed that the fire was communicated by the engine drawing such freight-train and through the negligence of those in charge and of defendants. The evidence that the barn was fired by sparks from the engine was circumstantial. The defendants' evidence was intended to prove that the train alleged to have occasioned the fire was properly run; that the engine was in good condition and had on a spark arrester of the most approved kind; that plaintiff's barn was old, and was covered with shingles which were dry and liable to ignite easily. The defendants claimed that the plaintiff was guilty of contributory negligence in not covering his barn roof with slate or some other non-combustible material. The plaintiff had a verdict and the defendant took a writ of error.

S. P. Wolverton and *C. R. Buckalew*, for plaintiffs in error. A railroad company is not answerable in damages for the reasonable exercise of a right; firing along the track by sparks from the engine is not of itself evidence of negligence. *Railroad Co. v. Yeiser*, 8 Barr, 366; *Philadelphia & Reading Railroad Co. v. Yeager*, 23 P. F. Smith, 121; *Frankford & B. Turnpike Co. v. Philadelphia & Trenton Railroad Co.*, 4 id. 345; *Lackawanna & B. Railroad Co. v. Doak*, 2 id. 379; Wharton on Negligence, § 872; *Howard Express Co. v. Wile*, 14 P. F. Smith, 201. If the owner of a building permits it to remain so that it is liable to be fired by sparks from an engine, it is negligence in the owner

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Ross v. Boston & Worcester Railroad Co., 6 Allen, 87 ; 1 Redfield on Railways, 453, *in nota*.

E. H. Baldy and *J. W. Comly*, for defendant in error, cited *Huyett v. Philadelphia & Reading Railroad Co.*, 11 Harris, 373 ; *Sheldon v. Hudson River Railroad Co.*, 14 N. Y. 218 ; *Field v. New York Central Railroad Co.*, 32 id. 339 ; *Cook v. Champlain Transportation Co.*, 1 Denio, 91 ; *Pennsylvania Railroad Co. v. Stranahan*, 29 P. F. Smith, 405.

AGNEW, C. J. Whether a barn or a house standing near to the track of a railroad was set on fire by sparks thrown from a locomotive is a question of fact, depending on the circumstances, when no direct proof is made, and therefore must be decided by a jury. Hence all the circumstances tending to the proof of the fact must be admitted in evidence. *Huyett v. Phila. & Read. Railroad Co.*, 11 Harris, 373 ; *Penn. Railroad Co. v. Stranahan*, 29 P. F. Smith, 405 ; *Webb v. Rome, Watertown et al. Railroad Co.*, 49 N. Y. 423 ; S. C., 10 Am. Rep. 389. The first and second errors are not supported. The third and fourth need no comment. Nor do we discover any error in the charge of the court and the answers to the points. The case was fairly submitted to the jury on the question of actual negligence and carelessness in the management of the defendants' engines. If none, the jury were instructed that the plaintiff could not recover. But if the barn was set on fire by actual carelessness, and negligent management of the engines, no question of contributory negligence could arise under the evidence. There was no evidence of any act of the plaintiff contributing to the burning of the barn. The defendants rested their case on the condition of the roof of the barn and the dry weather. The substance of the defendants' point was, that if the condition of the barn was such as to render it more liable to take fire than if it had had a secure and safe roof, the plaintiff was guilty of contributory negligence in suffering it to be in that condition. This is clearly unsound, and if sustained would require the owner of property lying along a railroad to keep it in a condition to be always safe from sparks or fire thrown from the passing engines. It would deprive the owner of the enjoyment of his property in the way most suitable to himself. He could not put his hay into stacks or ricks, or suffer straw to lie around his barn for his cattle to feed or rest upon. He must keep his houses, outhouses, stables and barns under the best known safe roofs, or insure them against the negligence of the company. An owner of property near to a railroad must run all the risks of a proper and careful use of the road, for this is

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the company's right. *Turnpike Co. v. Phila. & Trenton Railroad Co.*, 4 P. F. Smith, 352. When the railroad company uses the most approved spark arresters, and the proper care and vigilance in the running of its engines, and the land-owner's barn or hay rick or meadow takes fire from the sparks thrown out, he has no remedy. It is his own risk if he build too near to the railroad, or erects his tracks or scatters his straw where they may be consumed by fire caused by no negligence. But where actual negligence is proved, and the loss arises from it, the mere condition of his property is no defense to the company. In *Flynn v. San Francisco et al. Railroad Co.*, 40 Cal. 14; S. C., 6 Am. Rep. 595, it was held that to leave combustible matter lying on the railroad, where it was liable to be fired by the passing engines, was not an unavoidable accident, but was negligence in the company, and that it was not negligence, in a legal sense, for the plaintiff to leave the grass and stubble standing on his pasture and grain field. It was also held that the negligence of a plaintiff, which is contributory and will release the defendant, is limited to cases where the act or omission of the plaintiff is the proximate cause of the injury; but the plaintiff is not required to remove combustible materials in order to obviate the consequences of possible or even probable negligence of the defendant. A stronger case is that of *Kellogg v. The Chicago & N. W. Railroad Co.*, 26 Wis. 223; S. C., 7 Am. Rep. 69, in which the right of the adjoining land-owner and the duties of the railroad company are discussed very ably by Chief Justice DIXON. See also *Vaughan v. Taffrale Railway Co.*, 5 Hurlst. & Norm. 679. In Missouri the doctrine is carried even to a greater length, the fact that the plaintiff's premises were fired by sparks from the locomotive being held to be *prima facie* evidence of negligence in the company, which it must rebut by proof that it was using proper and safe engines, in a proper and safe way. *Clemens v. Han. & St. Jo. Railroad Co.*, 12 Mo. 366. The conclusion from the cases is very clear, that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence, must have done some act or omitted some duty, which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use and possess their farms and improvements, in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence.

Judgment affirmed.

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PENNSYLVANIA RAILROAD COMPANY v. HOPE.

(80 Penn. St. 373.)

Negligence — of railroad in setting fire to adjoining property — proximate cause.

Fire was communicated by a locomotive to a cross-tie of the track and spread thence through rubbish and dry grass to plaintiff's lands, about six hundred feet from the railroad. *Held*, that it was for the jury to determine whether the injury to plaintiff's land was the natural and probable consequence of the first firing.

Pennsylvania Railroad Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 481, distinguished.

ACTION on the case to recover for injuries done to plaintiff's property through the alleged negligence of the defendants. The opinion sufficiently states the case. The plaintiff had a verdict.

W. Mac Veagh and *W. Darlington*, for plaintiff in error, cited *Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith, 353; *Fairbanks v. Kerr*, 20 id. 91; S. C., 1 Am. Rep. 431; S. C., 10 id. 664; *Ryan v. N. Y. Central Railroad Co.*, 35 N. Y. 210.

W. E. Barber, for defendant in error, cited *Smith v. London & S. W. Railroad Co.*, Law Rep., 5 C. P. 98; *Vaughan v. Taff Vale Railroad Co.*, 3 Hurlst. & N. 679; *Flynn v. San Francisco & St. Jo. Railroad Co.*, 40 Cal. 14 (6 Am. Rep. 595); *Clement v. Hannibal & St. Jo. Railroad Co.*, 53 Mo. 366 (14 id. 460); *Fent v. Toledo, P. & W. Railroad Co.*, 59 Ill. 349 (id. 13); *Kellogg v. Chicago & N. W. Railway Co.*, 26 Wis. 223 (7 id. 69); *Perley v. Eastern Railroad Co.*, 98 Mass. 414; *Webb v. Rome, W. & O. Railroad Co.*, 49 N. Y. 420 (10 id. 389); *Ins. Co. v. Tweed*, 7 Wall. 45; *Pittsburg v. Grier*, 10 Harris, 65; *Scott v. Hunter*, 10 Wright, 192; *McGrew v. Stone*, 3 P. F. Smith, 436; *Fairbanks v. Kerr*, 20 id. 90 (id. 664).

AGNEW, C. J. Two principal questions arise in this case. The first has relation to the fact of negligence as causing the fire, and the second to the nearness or remoteness of the injury to the negligence causing it. The first three assignments of error belong to the former, and the fourth to the latter.

The court submitted to the jury the question of actual negligence. This was proper. The complaint is not that negligence is not a fact to be determined by them, but that the evidence of it was too weak, while the testimony of the defendant was strong and pointed, tha' their engine

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was in good order, well supplied with the best spark arrester, and was carefully and skillfully managed. It is true that the defendants made out a strong case, but there was such evidence of the fire having been kindled by the engine on the defendants' roadway, and carried thence into the fields of the plaintiff, by the dry grass cut and pulled up and piled with other rubbish upon the defendants' roadway, as tended to contradict the evidence of the defendants, strong as it seemed to be. The plaintiff's own testimony, as to how the fire kindled and spread, was corroborated by several witnesses. Hence it became a question of veracity and probability, which could not be withdrawn from the jury. The jury found the fact of actual negligence.

The second question is of importance, and in view of our own case of *Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith, 353; S. C., 1 Am. Rep. 431, requires a careful examination. After the mail train passed, fire was immediately discovered in one of the ties of the track, which was communicated directly to the grass adjoining, and running into a small heap of dry grass that had been cut and pulled and thrown into a pile, in the fall before, was carried thence by means of rubbish and dry grass on the company's ground, across the roadway to the fence, which was fired, and thence across two grass fields, burning the dry grass in its pathway, until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly toward the plaintiff's fields and woods.

It is contended that the defendants are not liable for the injury to the plaintiff's fence and woods, on the ground that the injury was too remote from the original cause; and *The Pennsylvania Railroad Company v. Kerr* is cited as authority for this. We agree with the court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together, that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause — the negligence of the defendants. The rule concerning involuntary negligence, as distinguished from wanton or intentional injury, is expressed in the maxim, *causa proxima non remota spectatur*.

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The rule is undisputed, but the difficulty lies in its application arising sometimes from the barrenness or uncertainty of the evidence, and sometimes from the intrinsic difficulty in the nature of the circumstances. In all or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury. All the court can do is to aid the jury by pointing to the relations of the facts. The jury must determine whether the original cause, that is, the negligence, is, by continuous operation, so linked to each successive fact, as that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause, and thus to be within the probable foresight of him whose negligence ran through the succession to the injury. In determining this relation, it is obvious we are not to be governed by abstractions, which, in theory only, cut off the succession. Abstractly each blade of grass or stalk of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line. But we cannot say that therefore the succession fails. It is at this point the province of the jury takes up the successive facts and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause. The practical knowledge and common sense of the jury applied to the evidence steps in to determine whether the injury is the real proximate result of the negligence, or, by reason of intervening and independent causes, must be regarded as too remote, and the result not within the probable foresight of the party whose negligence is alleged to have produced it. Applying to the facts of this case this practical every day sense, we cannot say that the verdict of the jury was not a well-formed judgment. In a field of dry grass, such as is described, and in such a state of the weather, it is obvious that a fire communicated to it from the fence of the roadway will pass from blade to blade, and stalk to stalk, until reaching a fence where old dried grass lies entangled among the rails; the fence, instead of being a barrier, only adds fuel to the flames. Thus by a continuous succession, open and probable to every eye, a fire started by negligence on the roadway continues onward without cessation, and every blade, stalk and rail becomes a part of the concatenation leading to the result, however far it be from the starting point. Here may be noticed the material qualifications of the late Chief

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Justice THOMPSON, in his opinion in the *Railroad Co. v. Kerr*, where he remarks, that there may be cases in which the causes of disaster, though seeming removed from the original cause, are still incapable of distinct separation from it; and where he adds, that the maxim *causa proxima non remota spectatur* is not controlled by *time* and *distance*, but by the *succession of events*. Had this case been presented to his mind, I doubt not he would have contrasted it broadly with that of *Railroad Co. v. Kerr*.

These remarks are perhaps sufficient to place this case on a basis of principle. It is also sustained by precedents. The following may be cited as distinctly and clearly on the point. *Kellogg v. Chicago & Northwestern Railway Co.*, 26 Wis. 224; S. C., 7 Am. Rep. 69; *Clement v. Hannibal & St. Jo. Railroad Co.*, 12 Mo. 866; *Webb v. Rome, Watertown & O. Railroad Co.*, 49 N. Y. 421; S. C., 10 Am. Rep. 889; *Perly v. Eastern Railroad Co.*, 98 Mass. 415; *Vaughan v. Taff Vale Railway Co.*, 8 Hurlst. & N. 73. The principles announced in *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349; S. C., 14 Am. Rep. 13, tend in the same direction; but it is a case more clearly allied in its facts to *Penn. Railroad Co. v. Kerr*, *supra*, which it criticises with some acerbity, and an imperfect understanding of the case, and with a little confusion of thought. It was not held in *Railroad v. Kerr*, that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second (59 Ill. 362); or that if a fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, A may be reimbursed by the company, while B must set down his loss to a remote cause, and suffer in silence (*id.* 358).

The determination of the writer of the opinion to cling to the ancient doctrine, that the *wanton wrong-doer* must take the consequences of his acts, whether measured by one or one hundred thousand dollars, perhaps is forcible. But as *wanton* injury was no characteristic of the case of *Railroad v. Kerr*, his conclusion is somewhat remote. It is quite possible some may not be shocked at the terrible and unforeseen consequences which follow a little act of unconscious negligence, as where a poor washerwoman boiling clothes set fire to the straw of an ice house, which in turn fired another building, and burnt on until the one-fourth of Pittsburgh lay in ashes. The mind of Chief Justice THOMPSON was of a different cast, and it did revolt at following out the consequences of an unintentional, yet legally speaking, negligent act, to a ruin so gigantic. But let us examine the case of *Railroad Co. v. Kerr*, and it will be found

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to be free from much of the criticism expended upon it. The facts were undisputed, in the words of Judge TAYLOR, who tried the cause, were uncontroverted and incontrovertible, and the point made before him was that the plaintiff had no cause of action, for the reason that the alleged negligent burning was not the natural and necessary result of the burning of the warehouse. It was contended "that where the act complained of was not voluntary or intentional, or one of affirmative illegality, but was simply the absence of proper care and caution, and not in itself the subject of criminal complaint, responsibility is not carried beyond the necessary and natural consequences of the act." When the case came into this court it was upon a reserved question, to wit, "assuming that the warehouse was ignited by sparks from the engine, chargeable to the negligence of the defendants' servants, the plaintiff, whose property was burnt in another building, to which the fire was communicated from the warehouse, and not from the engine, has no cause of action, for the reason that the alleged negligent burning was not the natural and necessary result of the burning of the warehouse." Thus the proposition came up in a bald and naked form, of a fire merely communicated from one house to another, and not the natural and necessary result of the burning of the warehouse. This was really the very question which ought to have been submitted to the jury, instead of being reserved in this form. In this state of the case the opinion dealt with the reserved question as one of primary and secondary causes. What might have been its fate if it had been committed to the jury to determine whether the communication of the fire from one building to the other was a natural and probable consequence of the firing of the first, it may not now be easy to say. Yet as the case was placed before the mind of Chief Justice THOMPSON, there is no reason to doubt the correctness of his conclusion. From the very essence of the thing, the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances. *Kellogg v. Chicago & N. W. Railway Co.*, *supra*, is a case nearly on all-fours with this. There Chief Justice DIXON, in a well-considered opinion, reaches the same conclusion, and fairly and in a proper spirit distinguishes *Railway Co. v. Kerr*, from the one he was discussing, remarking that the facts so entirely distinguish it that it seems hardly necessary to comment upon it. That in the former the point was, that the burnings were distinct and separate, a series of events succeeding one another; while in that before him there was but one burning, one continuous conflagration from the time the fire was set on the railroad until the plaintiff's property was destroyed. So it was here, the fire burning

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onward in direct and continuous succession, until it reached the woodland of the plaintiff.

Upon the whole case the conclusion seems to be with the plaintiff below, and the judgment should be affirmed.

BURK v. SERRILL.

(80 Penn. St. 413.)

Damages — contract by husband to sell land — refusal of wife to join in deed.

A husband contracted to sell land ; the wife, without collusion with the husband, refused to join in the deed. In an action for a breach of the contract, *held*, that compensatory damages only were recoverable.

ACTION of covenant to recover damages for a breach of a covenant by Burk to convey lands to Serrill. Defense that defendant's wife refused to join in the deed. The opinion states the case.

The plaintiff had a verdict for \$9,166.

W. Darlington, for plaintiff in error. The measure of damages for non-performance of a covenant to convey land, where there is no fraud, is the money paid with interest and expenses. *Bitner v. Brough*, 1 Jones, 129. Nothing for the goodness of his bargain : *Hertzog v. Hertzog*, 10 Casey, 418 ; *McDowell v. Oyer*, 9 Harris, 417. There was no fraud here. *Lee v. Dean*, 3 Whart. 331 ; *McNair v. Compton*, 11 Casey, 29. Nothing done on other land can be allowed to enhance damages. *Bollingbroke's Case*, 1 Sch. & Lef. 19, n.

W. Ward, for defendant in error. The plaintiff's remedy in this case is an action for damages. *Burk's Appeal*, 25 P. F. Smith, 141 ; S. C., 15 Am. Rep. 587. If the refusal to perform the covenant be dishonest or collusive, damages may include the appreciation in the value of the land. *Meason v. Kaine*, 17 P. F. Smith, 126. There was evidence for the jury of fraud in the defendant. *McNair v. Compton*, 11 Casey, 23. Fraud is difficult of proof and is properly proved by circumstances. *Parrott v. Parrott*, 1 Heisk. 622 ; *May v. Wright*, 1 Overt. 385. The loss in the profit by the bargain was an element in the measure of damages. *Bitner v. Brough*, 1 Jones, 127 ; *McClowry v. Croghan*, 1 Grant, 317.

GORDON, J. These parties were before us in January, 1874, as
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plaintiff and defendant in a bill in equity, brought by Serrill to compel Burk to execute a deed for the premises which were the subject of the agreement of July, 1870, upon which agreement the present action is founded. We then determined, Justice MERCUR delivering the opinion of the court, that the specific execution thereof could not be decreed against the vendor, unless the vendee should be willing to pay the full amount of the purchase-money and accept the deed without the execution thereof by the wife. The reason given by us for this conclusion was that a court of equity would lend its aid to nothing tending, even remotely, to coerce a wife to relinquish the rights conferred upon her by the laws of the land. *Burk's Appeal*, 25 P. F. Smith, 147; S. C., 13 Am. Rep. 587. Our statutes make very special provision that she shall part with her dower in her husband's land only upon her own free will and consent, and the magistrate, before whom her acknowledgment is to be taken, is charged to see to it, that there has been no undue influence brought to bear upon her. If, however, her refusal to execute the deed is to suspend the payment to the husband of one-third of the purchase-money during her life, or to subject him to an action for exemplary damage, we can readily perceive that, in this manner, a coercive influence may be brought to bear upon her through her husband, which she may not be able to resist, and thus by indirection that may be effected which could not be accomplished by direct means. This method of compelling a wife to do what the law endeavors to protect her in not doing, is something that the courts have long ago determined not to sanction. In the equity case just referred to, at the instance of the plaintiff's counsel, we directed that a decree might be entered against the defendant, that upon the payment of the purchase-money to him in full he should execute a deed for the premises.

It seems, however, that Serrill, or the company for whom he was acting, did not see fit to accept of this order, but resolved to resort to this action at law, the result of which we have before us. We need not go over the exceptions in detail, for one prime question covers them all. The learned judge of the Common Pleas instructed the jury, that they might find from all the evidence submitted to them that Burk fraudulently induced his wife to refuse to sign the deed, that he might in this manner escape from his own contract, and that if they so found, they might inflict damages upon him to an amount even exceeding the full value of the land. The result of this charge was a verdict of \$9,166.66, though the amount actually paid by Serrill to Burk, on the contract, was but \$50, and the actual incidental expenses, as testified to by Serrill himself, were so trifling that he did not think it worth his while to fix the amount. Or

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this instruction, the defendant complains, and we think justly. There was no affirmative evidence whatever tending to show that Burk had either directly or indirectly influenced his wife's action in the matter ; on the other hand, he, his wife, and Thomas Johnson, swore positively, that from the first, she of her own accord refused to execute the deed.

This should have settled the matter, and the jury should have been informed that they were to render a verdict for compensatory damages only. The fact upon which the court seemed to lay so much stress, that is, upon the lack of promptness in the defendant in informing Serrill that his wife had refused to sign the deed, of itself amounted to nothing. In the question of fraud, time was of no consequence whatever, as it turned upon the single fact that Burk had prevailed upon his wife to refuse her assent to the contract ; that established and the case was made out ; that negatived and the case fell, at least so far as exemplary damages were involved. This question of time may be important in the settlement of the actual damages sustained by the plaintiff ; as if he was thereby induced to have the papers and brief prepared, or searches or surveys made, the trouble and expenses of which he might have been saved by timely information of the wife's determination. In this view of the matter this delay may have some significance, but in no order. On the whole we cannot see that the plaintiff is entitled to much sympathy in this matter. He knew that the wife's assent must be obtained or her right of dower could not be divested, and if he chose not to consult her, and thus ran the risk of finally obtaining that assent, he has himself to blame if his success was not what he expected. That the husband said that his wife would do what he wanted her to do does not alter the case, for, without consulting her, he had no right to make any such engagement for her. However this may be, it is certain we cannot, in view of our statutes and decisions, permit the will of the wife to be coerced, through the pressure of heavy exemplary damages upon her husband, resulting from an assertion of her own undoubted right.

The judgment is reversed and a venire facias de novo awarded.

DE HAVEN v. WILLIAMS.

(80 Penn. St. 490.)

Executors — power of one of several executors

Co-executors deposited money belonging to the estate with bankers to their joint account as executors ; the bankers failed and assigned their property for the benefit of

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creditors. *Held*, that one of the executors could not release the claim of the estate against the bankers by signing with other creditors, an agreement to look solely to the funds in the hands of the assignee.

ACTION of assumpsit by Williams and another, executors of Anthony Williams, deceased, against De Haven and another, to recover the amount of a deposit made by the plaintiffs with defendants. The affidavit of the claim was as follows :

“ That the plaintiffs in this suit, as executors of the last will and testament of Anthony Williams, deceased, lent to the defendants in this suit, at four per cent interest, on March 30th, 1872, \$12,608.45 ; on April 6th, 1872, \$435 ; on April 10th, 1873, \$5,630.90 ; and on April 15th, 1873, \$3,716.01 ; to be paid by the said defendants to the said plaintiffs with interest, when demanded ; that on October 6th, 1873, there remained unpaid of said loans \$10,217.52 ; that the defendants stopped payment in September, 1873, and plaintiffs in this suit claim to recover the same, with interest, from October 6th, 1873.”

The affidavit of defense was :

“ That a sum of money, as will appear from the copy filed, was deposited with the said defendants by George C. Williams and Daniel Williams, executors of Anthony Williams, deceased ; that after suspension of the defendants, in September last, they entered into a composition with their creditors, which was signed by George C. Williams, one of the said executors for the said estate, before the bringing of the suit in this case, by the terms of which agreement all the property of said defendants was conveyed to John M. Maris, as trustee for the executors of said defendants. It was further provided that, upon the said agreement being signed by a committee, consisting of Edwin M. Lewis, Samuel R. Parke and William S. Kirk, the agreement shall go into effect and operation.

“ It was further provided by the twelfth clause of the said agreement, as follows :

“ ‘ When, and as soon as this agreement is signed by the parties of the first part and second part, and the approval thereof is given to it by the committee above mentioned, the said parties of the third part do hereby agree with the other parties hereto, and with one another, that the agreement shall then take effect and operate ; and immediately thereupon the parties of the first part, individually and trading as DeHaven & Brother, shall be fully and finally released, acquitted and discharged from the several sums due the creditors whose names are subscribed to this agreement.’

“ Deponent says and expects to prove, that the said agreement has

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been signed by the parties of the first and second parts, and that the said committee have approved the same, and that it has gone into full effect and operation, and that the said George C. Williams, on behalf of said estate of Anthony Williams, has duly signed said agreement; and he avers that said defendants are thereby released and discharged from the debt upon which suit has been brought in this case."

On a rule for judgment, for want of a sufficient affidavit of defense, the court made the rule absolute, HARE, P. J., delivering the following opinion:

"The question presented in this case is, so far as I am aware, one of the first impression. It is, whether one co-executor can, without the knowledge and assent of the other, release a demand arising from a deposit made in the names of both, and agree to look solely to the fund in the hands of the assignee, to whom the debtor has transferred his property for the benefit of his creditors.

"The inclination of the court, in the first instance, was in favor of the validity of the defense, but an attentive examination of the authorities has led to an opposite result. It is well settled in general, that the acts of one co-executor bind the others, by reason of the confidence reposed in them individually, in consequence of which each has full power over the assets. *Beltzhoover v. Darrah*, 16 S. & R. 327, 329. This is an exception to the rule that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is requisite to its due execution. *Sinclair v. Jackson*, 8 Cow. 583, 588; and distinguishes executors from trustees, who are regarded by equity as forming one collective trustee, and must, therefore, execute the duties of the office in their joint capacity. *Vandever's Appeal*, 8 W. & S. 405, 409. Hence a payment to one executor, or a release from him, extinguishes the debt, although he misapplies the money and no part of it comes to the use of the estate. *Herbert v. Pigott*, 2 C. & M. 384. For a like reason one may, where the circumstances require it, take part and release the residue, or accept goods or securities in satisfaction. *Smith v. Everett*, 27 Beav. 446; *Gilman v. Healy*, 55 Me. 120; and it will make no difference if the case be free from fraud, that the compromise is effected without the knowledge of the co-executor, or that it is against his wishes. *Murray v. Blatchford*, 1 Wend. 583; *Herbert v. Pigott*, 2 C. & M. 384. It results from this principle that one of several co-executors is not answerable for the acts or defaults of his companions, unless he was negligent or had notice of some fact or circumstance rendering it a duty to interfere. *Townly v. Sherborne*, 1 Bridg. 39.

“It is at the same time equally well established that executors may join in the administration of the assets; and such is often the better course as affording an additional guaranty to the creditors and legatees. Under these circumstances each is responsible for the safe-keeping of the fund, and cannot allege the neglect or misconduct of another as an excuse for a loss which would not have occurred if he had been diligent. *Mendes v. Guedalla*, 2 J. & H. 259. Ordinarily, an executor is not liable for nonfeasance; but if he enters on the execution of any part of the trust he cannot stop short, and must do all that is requisite to conduct the business to a successful termination. An executor who unites in the collection of a debt cannot get rid of his responsibility by leaving the proceeds in the custody of his associate, and should, on the contrary, take such measures as will prevent the fund from being used without his knowledge. The place of safe-keeping must consequently be one where both can exercise a control or supervision. The authorities accordingly agree that money which has been received by a co-executor should be deposited to the joint account; and if this precaution is not observed, and a loss ensues through the fraud of him who is intrusted with the fund, a chancellor will visit the consequences on both. See *Clough v. Bond*, 3 Myl. & C. 490; *Langford v. Gascoyne*, 11 Ves. 333. Under these circumstances they are still executors, but executors charged with a fiduciary obligation, which renders them virtually trustees as it regards the assets which they have received and hold in common.

“The existence of such an obligation implies the power to fulfill it. *Lex neminem cogit ad vana seu impossibilia*. It were futile to open a joint account, if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check, in order to discharge the banker; and it follows that he cannot rely on a compromise or release by one as a defense. This is not so much an exception to the rule, that a payment to a co-executor discharges the debt, as a return to the general rule, to which that is an exception. The right of each executor to act without the concurrence of the rest seems to have been the growth of circumstances. A testator might have assets in different counties, and lying as far apart as Canterbury and York. It might be difficult or impracticable to find any one who was able and willing to assume the whole responsibility, and he might appoint a representative in either province, in the expectation that each would collect what lay nearest his own door. So one executor may be chosen for his knowledge of accounts, and another for his skill and sagacity in the adjustment of outstanding and disputed claims. Under these circumstances, it would be useless and injurious to require that all should join in acts that can be better performed by one

The privilege is not confined to executors, but extends measurably to trustees, who, as Lord Keeper COVENTRY observed in *Townly v. Sherborne*, may permit one of their number to receive all or the most part of the profits without a breach of trust, 'it falling out many times that some of the trustees live far from the lands, and are put in the trust out of other respects than to be troubled with the receipt of the profits.' In this case, as in that of executors, the right to receive necessarily implies the power to give an acquittance.

"It results from what has been said that the right of executors to sever in the execution of the trust is a concession to expediency, which should not be made when the case is one for care and judgment, and it is possible for all to unite without inconvenience. It does not, therefore, exist, where a fund arising from the collection or sale of the assets comes to the hands of two or more executors or administrators, or has been deposited to their joint account. Under these circumstances, there is nothing to exclude the principle that persons acting in a fiduciary capacity must concur in every measure affecting the interests which they represent. See *Beltzhoover v. Darragh*, 16 S. & R. 329, 339; *Mendes v. Guedalla*."

Judgment was accordingly entered for the plaintiff, and the damages assessed at \$10,377.59.

This was assigned for error, on the removal of the record to the Supreme Court by the defendants by writ of error.

E. G. Platt and *S. Dickson*, for plaintiffs in error. Joint executors are possessed of the estate each as of the entirety, and consequently the act of each is the act of all. Bac. Abr. "Exrs. and Admrs.," D.; 1 Godolph. 134; Williams on Executors, 245, 946; Toller, 37; *Smith v. Everett*, 27 Beav. 447. One executor can compromise any claim which the estate may hold against any one, even though the other dissent. *Murray v. Blatchford*, 1 Wend. 583; *Herbert v. Pigott*, 2 Cr. & M. 484.

J. W. Hunsicker, for defendants in error. If co-executors are trustees all must unite in executing the trust. *Sinclair v. Jackson*, 8 Cow. 543; *Vandever's Appeal*, 8 W. & S. 405. Co-executors after the collection of the assets of the testator by them jointly and held in their joint names are trustees, and all must unite in executing the trust. *Beltzhoover v. Darragh*, 16 S. & R. 329; *Turner v. Hardey*, 9 M. & W. 770; *Smith v. Whiting*, 9 Mass. 334; *Hertell v. Bogart*, 9 Paige, 52; *Ellwell v. Quash*, 1 Strange, 20; *James v. Buckley*, 16 Johns. 277; *Hall v. Boyd*, 6 Barr, 267.

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PER CURIAM. The well-considered opinion of Judge HARE sufficiently vindicates his ruling. For the reasons given by him the judgment is affirmed.

WISTAR V. PHILADELPHIA.

(80 Penn. St. 505.)

Municipal corporation — assessment for betterments — limit of the power.

The power in a municipal corporation to make betterments at the expense of adjoining property owners is a power of special taxation and must have explicit legislation to support it.

A city was authorized by law to "prescribe by ordinance that paving of streets and of footways should be done at the expense of the owners of ground" fronting them. *Held*, that this did not confer upon the city power to tear up a pavement which was good and in no need of repair, and to relay and charge the owner again with one excessively costly.

SCIRE FACIAS sur mechanic's lien by the city of Philadelphia against Wistar. The opinion states the facts. The District Court entered judgment against the defendant, who sued out a writ of error.

J. H. Gendell, and *E. S. Miller*, for plaintiffs in error. The improvement for which this claim is made is to compel the defendant to pay for that which is a general benefit; this cannot be done. *Hammett v. Philadelphia*, 15 P. F. Smith, 146; S. C., 8 Am. Rep. 615; *Washington Avenue*, 19 P. F. Smith, 352; S. C., 8 Am. Rep. 255.

D. W. Sellers, for defendant in error. The Acts of Assembly and city ordinances under which the work was done are valid. *Philadelphia v. Sutter*, 6 Casey, 55; *Philadelphia v. Tryon*, 11 id. 401; *Philadelphia v. Wistar*, id. 427; *Lipps v. Philadelphia*, 2 Wright, 503; *Philadelphia v. Burgin*, 14 id. 539. No conclusion of any defense which shows a want of power to authorize the work has been sustained. *Kensington v. Keith*, 2 Barr, 218; *Reilly v. Philadelphia*, 10 P. F. Smith, 467; *Hammett v. Philadelphia*, 15 id. 146; S. C., 8 Am. Rep. 615; *Philadelphia v. Hoxie*, 2 Wright, 339. In all cases where a statutory tribunal is created to determine a question out of the course of the common law, there is no review in any manner of the judgment of such tribunal, unless the statute gives it. *Taylor v. Board of Health*, 7 Casey, 75; *Fisher v. Harrisburg*, 2 Grant, 291; *Wharton v. Borough*, 1 Wright,

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871; *Horner v. Railroad Co.*, id. 835; *Carr v. Northern Liberties*, 11 Casey, 324; *Hughes v. Kline*, 6 id. 227; *Kimber v. County*, 8 Harris, 366; *Hulseman v. Rems*, 5 Wright, 396; *Richardson's Appeal*, 6 Casey, 510.

AGNEW, J. What we have to deal with here is the affidavit of defense. Does it set forth a sufficient ground to defeat the plaintiff's recovery? Want of power to impose the alleged liability is clearly a good defense. The question is not whether the legislature might authorize such a claim to be made, but whether this authority has been granted.

The original and supplemental affidavits are diffuse, setting forth many things unnecessary to be noticed. Premising that the claim filed is a naked charge for 121½ feet of curbstone laid opposite the defendant's lot, without circumstances stated, except that the work was done in pursuance of the ordinance of December 31st, 1872, after adjustment of the curb line, and a contract made for paving the street, we may gather and condense the following facts from the affidavits of defense. That about three years before the new curbing was set, the footway opposite defendant's lot had been well paved, and the curb set at his expense; that they were of proper and sufficient width, similar in style to those in other parts of the city, and well done according to the laws and ordinances of the city; that they were in good order and condition, needing no repair or improvement, and no resetting, alteration or substitution; that the new curbing was no repair, but that the city chose, of her own purpose, to change the alignment of the curb and pavement, and to require a new and most expensive granite curb to be set on the new line, costing more than treble the expense of the former curb, without any allowance for the cost of the former curbing. On these facts the question is, did the laws conferring authority on the city to pave footways and curb them at the expense of the owners of the ground in front thereof, confer the power to set new and costly curbs on a new line at the expense of the owners?

As remarked by WOODWARD, J., in *City v. Tryon*, 11 Casey, 402: "This is a power of special taxation, and must have explicit legislation to support it." The property in question lies on Broad street, between Race and Vine, and is therefore within the old city. The only legislation to which we have been referred, or which I have found, is in the Consolidation Act of February 2d, 1854, and in the 40th section, viz.: "That it may be prescribed by ordinance that paving of streets, except at the intersection thereof, and of footways, and laying water-

pipes within the limits of the city, shall be done at the expense of the owners of ground in front whereof such work shall be done, and liens may be filed by said city for the same, as is now practiced and allowed by law." It may be conceded that curbing is a necessary part of paving to separate and support the footway from the cartway. It may be conceded also, that a general power to pave implies a power to repair and repave when the condition of the cartway or footway requires it; and of this *prima facie* the city officers may judge. The affidavit asserts that this was not a repair but a new alignment and alteration of the curb. Then does the 40th section of the Act of 1854 confer a power at pleasure, to change, take up, alter, and relay pavements, and reset curbs, at the expense of the owner of the front, who has recently paid for a good pavement or curb; and therefore to do this as often as the city may choose to alter its plans of improvement. Without referring to any power in the legislature to confer such an authority, the question is, is this the true scope and design of the legislation before us; is it the interpretation we should give to the section? We think not. A power so onerous upon the citizen must be plainly conferred, if, indeed, it is not obnoxious to the charge that it is palpably oppressive and unjust. It is in derogation of the right of private property, seeking to lay a special tax on a small class of citizens. The foundation of this power, to tax specially, is the benefit the object of the tax confers on the owner of the property. The law simply provides for the paving of streets and footways at the expense of the front owner. What would any one ordinarily understand is meant by paving streets at the expense of the owners of the ground fronting thereon? Clearly that paving which is customary.

An unpaved street is inconvenient and disagreeable, and property lying on it is less valuable. To remove these evils the city paves, and the owner whose property is thus benefited is required to pay for it. Such a law is not unjust, and as thus understood the legislature passes it and the courts sustain it. Being in this form, it is beneficial to the public and to the property owner. But if we say the city may change its pavements at pleasure, and as often as it please, at the expense of the ground owner, we take a new step, and there must be explicit legislation to authorize such taxation. If the 40th section were before the legislature on its passage, would any member suppose for a moment he was committing to the city a power to alter its pavements, take up, relay, experiment on one kind, then on another, and so *toties quoties*, as a change of views or of interests might dictate, and this should be done at the expense of the ground owners, without their consent, and notwith-

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standing they had paid fully for that improvement of the street, which was the basis of their taxation? Clearly no one would take such a meaning from the 40th section, or he would at least doubt this intent; and if doubtful it is not explicit. If, while the pavement is good and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction, not taxation. Of course the city may change its plans of improvement, and experiment to suit the views of those in power, and if it be unwise, the corrective lies in the popular vote to remove those guilty of such folly and lavish expenditure. But under the 40th section no such changes and experiments can be made at the expense of the lot owners, who have no power to correct the evil. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing. Whether the legislature can do so is not our question. We must not force the words of the law, but in these times of jobbing and corrupt practices adhere to the strict line of interpretation set before us by our predecessors. There must be explicit legislation to support special taxation. It was in this spirit Justice WOODWARD wrote in the *City v. Tryon*, *supra*, and in which he was led in *City v. Hoxie*, 2 Wright, 339, to say, that there was no authority for the building of culverts within the old city, at the expense of the lot owners. See also *Reed's Ex'rs v. City of Erie*, 29 P. F. Smith, 346. For these reasons we think the defendant was entitled to a trial by jury of the facts set forth in his affidavit.

It is proper here to advert to the case of *Lea v. City of Philadelphia*, 1 Weekly Notes, 189; see S. C., reported in 32 Leg. Int. 292, which was commented upon in the argument. That was a case of *repair*, having no bearing on this. It is proper to say that the obscurity supposed to exist in the opinion does not exist in the original on file, but in the report, and is owing to the attempt to condense it by the reporter. The reported opinion certainly is not clear.

Judgment reversed, and a procedendo awarded.

Additional opinion delivered May 22d, 1876.

PER CURIAM. Since the filing of our opinion in this case we have been referred to the Act of 16th of April, 1838, sect. 3, Pamph. L. 626, authorizing the councils of Philadelphia "to make and establish so many rules and regulations as to them may seem expedient for the better regulation of porches, benches, door-steps, railings, bulk-windows, areas, cellar-doors," and a large number of other subjects, proper for city regulation, concluding, "and at the expense of the owner or owners of

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the property adjoining, to regulate, grade, pave and repave, curb and recurb, the said footways or sidewalks," etc. It is evident this section is no more than a collection and consolidation in a short compass of the various subjects of general regulation, and the provision for paving and repaving simply conveys the ordinary power for this purpose. It was not intended to subject the property of the citizens to arbitrary changes of policy, or of opinion, or caprice, which follow changes in councils, or in their views of improvement. We cannot suppose the legislature meant to convey any such extraordinary and oppressive authority. If it did, then the latter Consolidation Act of 1854 must have been intended to restrict it. *Johnson Freeman's Appeal*, 25 P. F. Smith, 96, is no recognition of the Act of 1838, as giving a wider grant of power; but as Justice GORDON remarks, the Act of 1854 is the nerve through which the city derives its power.

We perceive no reason to alter the opinion filed in this case.

 PEASE V. SHIPPEN.

(80 Penn. St. 513.)

Slander — general rumor in mitigation.

In actions for slander, general reports of the truth of the charges are not admissible for any purpose.

Under the plea of the general issue only, whilst the plaintiff's general character may be assailed, neither particular reports nor the general currency of the particular charge can be given in evidence.

ACTION on the case for slander, brought by Nial Pease against Evans W. Shippen. The declaration contained three counts. In the first, the words alleged to have been spoken were: "This road was laid when you were in the penitentiary;" in the second, "You were in the penitentiary of Massachusetts;" in the third, "You are a perjured rascal, and have been in the penitentiary." The plea was, "Not guilty." The case was tried before LOWRIE, P. J.

The plaintiff proved the uttering of words laid in the declaration.

The defendant then offered to prove, in order to rebut the presumption of malice and in mitigation of damages, a general report in the neighborhood that Pease had been in the penitentiary. The offer was objected to by the plaintiff, admitted by the court, and a bill of excep-

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tions sealed. The witnesses testified that there had long been a rumor in the neighborhood that the plaintiff had been in the penitentiary.

The verdict was for the plaintiff for \$1 damages. He took a writ of error, and assigned for error the admission of defendant's offer of evidence.

Roe Reisinger and *A. B. Richmond*, for plaintiff in error. Whilst the defendant, in an action of slander, may assail the general character of the plaintiff, he cannot give evidence of particular reports. *Lukehart v. Byerly*, 3 P. F. Smith, 421; *Long v. Brougher*, 5 Watts, 439; *Conroe v. Conroe*, 11 Wright, 201; *Smith v. Stewart*, 5 Barr, 372; *Steinman v. Mc Williams*, 6 id. 173; *Fitzgerald v. Stewart*, 3 P. F. Smith, 343; *Codwell v. Swan*, 3 Pick. 376; *Wolcott v. Hall*, 6 Mass. 517; *Alderman v. French*, 1 Pick. 17; *Root v. King*, 7 Cow. 680; *Matson v. Buck*, 5 id. 499.

Douglass and *McCoy*, for defendant in error. In actions in slander under the plea of not guilty, evidence which does not tend to prove the truth of the offense charged, but which was calculated to induce a mistaken belief in the mind of the defendant that the charge was well founded, is admissible to disprove malice and in mitigation of damages. *Steers v. Kemble*, 3 Casey, 112; *Chapman v. Calder*, 2 Harris, 365; *Minesinger v. Kerr*, 9 Barr, 312; *Petrie v. Rose*, 5 W. & S. 364; *Bechler v. Steever*, 2 Whart. 313; *Porter v. Botkins*, 9 P. F. Smith, 484.

WILLIAMS, J. The question presented by this record has been variously decided by the English and American courts, and the decisions of the same court have not always been uniform and consistent. In England, and in some of the United States courts, it has been held that, under the general issue, in slander, the defendant may prove, in mitigation of damages, that when the words were uttered a general rumor or report existed in the neighborhood that the plaintiff was guilty of the offense charged. *Earl of Leicester v. Walter*, 2 Campbell, 281; 1 M. & S. 284; *Wetherton v. Marsh*, 20 N. H. 561; *Care v. Marks*, 20 Conn. 248; *Fuller v. Dean*, 31 Ala. 654; *Galloway v. Courtney*, 10 Rich. (S. C.) Rep. 414; *Calloway v. Middleton*, 2 A. K. Marsh. 372; *Henson v. Veatch*, 1 Blackst. 369. In other States it has been held that general reports of the truth of the charges cannot be given in evidence in mitigation of damages. *Wolcott v. Hall*, 6 Mass. 514; *Alderman v. French*, 1 Pick. 17; *Codwell v. Swan*, 3 id. 376; *Matson v. Buck*, 5 Cow. 499; *Root v. King*, 9 id. 613; *Cole v. Perry*, 8 id. 314; *Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster* 8 id. 602; *Sheaben v. Collins*, 20 Ill.

855; *Young v. Bennett*, 4 Scam. 48; *Anthony v. Stephens*, 1 Miss. 254. Whatever may have been at one time the rule in this State as to the admissions of such reports (*Kennedy v. Gregory*, 1 Binn. 85; *Beehler v. Steever*, 2 Whart. 318; *Smith v. Stewart*, 5 Barr, 372),—it must now be regarded as the settled law of Pennsylvania, that they are not admissible for any purpose. *Fitzgerald v. Stewart*, 3 P. F. Smith, 343; *Lukehart v. Byerly*, id. 418. In the former case (*Fitzgerald v. Stewart*) the court was asked to charge in substance that if the jury found there were general suspicions and reports that the plaintiff was guilty of the offense charged in circulation before the defendant spoke the words, and that the defendant only uttered what was already in general circulation, in that event they should consider the fact in mitigation of damages. To this the court answered that if these suspicions and reports originated with the plaintiff herself, it was material in lessening the damages; but if the evidence did not prove that the plaintiff gave rise to the reports, the fact that they existed was not evidence against her, and ought to be disregarded by the jury. In delivering the opinion of this court, affirming the correctness of this answer, STRONG, J., said: "It is to be noticed that the point did not refer to the general character of the plaintiff, but to the suspicions of a single guilty act. Nor did the point present a case of suspicions known to the defendant when she uttered the slander. If they were unknown, their existence did not tend to show a less degree of malice in the defendant, and if they were known, it ought to be regarded no apology for her that others were repeating similar slanders. In the present case the defendant herself may have been the author of the reports long before she spoke the words complained of in the declaration. Whatever may be the rule elsewhere, it is well settled with us, that while the general character of the plaintiff in an action for slander may be assailed, particular reports, or reports of guiltiness of particular offenses, may not be given in evidence for any purpose, not even to mitigate damages." In the latter case (*Lukehart v. Byerly*), the defendant proposed to prove that weeks before the plaintiff alleged the defendant spoke the words charged in the *narr*, they had been spoken by other parties, and were in general circulation in the neighborhood, and the story was communicated to the defendant. The court rejected the first part of the proposition to prove that there were reports of this matter through the country, and that others had spoken of it, but admitted that part of the proposition which proposed to prove that the circumstances were communicated to the defendant before the uttering of the words proved in the case. The defendant excepted to this ruling, and this court held that the evidence was rightly rejected. WOODWARD, J., said

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“The general issue only had been pleaded, and under this, whilst the defendant might assail the general character of the plaintiff, he might not, as I understand the decisions, give evidence of particular reports, not even of the general currency of the particular charge which he took up and indorsed. *Long v. Brougher*, 5 Watts, 489; *Conroe v. Conroe and Wife*, 11 Wright, 201, and the cases cited.” These authorities are binding upon us, and are decisive of the questions presented by the bill of exceptions in this case. It follows that the court below erred in admitting the evidence complained of.

Judgment reversed and a venire facias de novo awarded.

CASES
IN THE
S U P R E M E C O U R T
OF
VERMONT.

PIERCE V. WHITCOMB.

(48 Vt. 127.)

Negligence — dangerous premises — liability of owner to one frequenting on business.

Plaintiff went at night to defendant's house to buy oats. Defendant had no oats that he wished to sell, but by reason of plaintiff's importunity, he agreed to sell him some, and they went together to the barn where the oats were kept. While defendant was seeking a measure, plaintiff walked about the barn in the dark, fell through a hole in the floor and was injured. *Held*, that plaintiff was not liable.

ACTION on the case. The opinion states the case. A *pro forma* judgment was ordered for the plaintiff for \$2,500 to which defendant excepted.

Wales & Taft (Hard with them), for plaintiff, cited *Carlton v. Fran. Iron Co.*, 99 Mass. 216; *Coombs v. New Bedford Cordage Co.*, 102 id. 572; S. C., 3 Am. Rep. 506; *Sweeney v. O. C. & N. R. R. Co.*, 10 Allen, 368; *Smith v. Dock Co.*, Law Rep., 3 C. P. 326; *Indermaur v. Dames*, 1 id. 274; Wharton on Neg., §§ 824, 826; Shearman & Redf. on Neg., § 498; *Holmes v. R. R. Co.*, Law Rep., 4 Exch. 254.

H. Ballard (Phelps with him), for defendant.

REDFIELD, J. This is an action on the case to recover damages for a severe injury to the plaintiff, occasioned, as the plaintiff claims, by defendant's actionable negligence. The facts in the case are stated in the referee's report.

The plaintiff, a farmer, went to the defendant, who owned a large farm in Essex, to buy six bushels of oats, late in the evening. The defendant had no oats that he wished to sell, but by reason of the plaintiff's importunity and necessities, he consented to sell the plaintiff six bushels. The defendant went some distance to procure the key, unlocked the granary, and went with the plaintiff to the oats lying in bulk on the open floor above. He stepped back for his measure, and while thus

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absent, the plaintiff traveled across the floor in another direction, in the dark, and fell through an aperture in the floor, and received a severe injury.

If the defendant is liable to redress this injury to the plaintiff, it is because he did him a wrong in omitting to perform a duty that he owed the plaintiff. In *Carlton v. Fran. Iron Co.*, Ch. J. GRAY says: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of." 99 Mass. 216. This must be understood as applying to the "unsafe condition of the land or of the access to it," where the business thus invited was done, and not to pitfalls, quagmires, and precipices that might be unsafe to strangers, on other parts of the same field, where the party may have wandered for matters of observation or curiosity. We think this *dictum* of the chief justice, as applied to the facts of that case, entirely sound, for in that case the defendant had negligently omitted a duty that he owed the plaintiff, whereby he had suffered injury. In a case recently determined in Massachusetts (*Severy v. Nickerson et al.*, 120 Mass. 306), the plaintiff was in the service of the defendants, loading ice into a vessel, and wandered about the vessel for inspection and curiosity, supposing it to be safe, and fell through a scuttle and was injured. The court held that he voluntarily took the risk upon himself, and could not recover of the employer. In the old and leading case of *Blithe v. Topham*, 1 Vin. Abr. 564, it is laid down as a rule, that "if A, being seized of a waste adjoining a highway, digs a pit in the waste within 36 feet of the way, and the mare of B escapes into the waste, and falls into the pit and is killed, yet B shall not have any action against A, because the making of the pit in the waste and not in the highway, was no wrong to B, but it was by the default of B himself that his mare escaped into the waste." And in *Jordin v. Crump*, 8 M. & W. 782, a man passing in the dark along a foot-path accidentally fell into a pit dug by the owner in an adjoining field. ALDERSON, B., says: "The party digging the pit would be responsible for the injury if the pit was dug across the road, but if it were only in an adjacent field, the case would be very different, for the falling into the pit would be the act of the injured party himself." In *Seymour v. Maddox*, 71 E. C. L. 326 (16 Q. B. 326), a hired chorus singer at a theatre fell through an aperture made for the actors to pass from the dressing room to the back of the stage, and claimed that he was injured

by reason of this aperture not being properly fenced and lighted. The court held he could not recover, "because the facts stated did not raise a duty, a breach of which was complained of." In *Barnes v. Ward*, 67 E. C. L. 392 (2 C. & K. 661; 9 C. B. 392), the excavation immediately joined a public footway, and so amounted to a public nuisance, and the owner of the land was held liable. *Hardcastle v. S. Y. R. R. Co.*, 4 Hurlst. & N. 67, is a like authority. In *Corby v. Hill*, 93 E. C. L. 556 (4 C. B. [N. S.] 556), the owner of the house had a private road for the use of persons coming to his house. He permitted his workmen to place slate across said way, and the plaintiff, while lawfully using said way, was injured. COCKBURN, Ch. J., says: "The proprietors of the soil held out an *allurement*, whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum, as the means of access thereto; could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation?" In *Chapman v. Rothwell*, 96 E. C. L. 168 (El. Bl. & El. 168), the plaintiff's wife fell through a trap-door in the footway to and from defendant's brewery, and was thereby killed; and defendant was held liable. The rule of law seems well defined, and founded in reason and justice. No one has a right to provide a path for access to his house, shop, or store, and *invite* guests and patrons thereto, and provide or permit pitfalls in the way, to their injury. For in all such cases there is an implied guaranty that they may comply with such invitation with safety. But if one departs substantially from the provided way of access, or, becoming the guest or patron in a place of business, and of his own motion goes in the dark into places of danger, and is injured, he voluntarily takes the peril and risk upon himself. *Sweeney v. O. C. R. Co.*, 10 Allen, 368; *Elliot v. Perry*, id. 385; *Sawyer v. R. & B. R. Co.*, 27 Vt. 370; *Wright v. Geer*, 6 id. 151.

And in this case, although the defendant did not wish to sell the oats, and only yielded to the importunity of the plaintiff, and, to his own inconvenience, went to his granary late at night, to favor and accommodate the plaintiff, yet allowing the plaintiff to go into the granary with him to take the delivery of the oats, we think the defendant did assume the duty to the plaintiff that the means of access was reasonably safe. And if the plaintiff on going to or returning from the oats, or in putting them into bags and taking the delivery, while doing that matter of business, had accidentally, without warning, slipped into a pitfall, it would have been a very different case. The granary was a private receptacle of the defendant's grain, kept constantly locked. The plaintiff was per

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mitted there for one simple, specific matter of business — to take six bushels of oats ; the oats were shown him ; to facilitate the delivery, the defendant went for his measure ; he left the plaintiff at the oats where he should be, in the dark, but in a *safe place*. The oats could be delivered at no other place, and no other matter of business was permitted to him there. If for curiosity or other motive, he chose to occupy that moment in the darkness in wandering about the granary, and lost an eye by the point of a scythe, or stumbled over a horse-rake and maimed himself, or fell through a scuttle in the floor, he was doing what he was not invited or permitted by the defendant to do, and what was no part of the business in hand ; and we think this departure was of his motion, and at his risk. *Hansell v. Smythe*, 97 E. C. L. 731.

We have no occasion to discuss how far the plaintiff would be affected by his previous knowledge of this opening in the floor of the granary ; for whether he had knowledge or not, he cannot recover. And the fact that he was severely injured, proves that the act was careless, and the traveling about the granary in the dark not only contributed to the injury, but was the cause of it.

Judgment reversed, and judgment that defendant recover his costs.

BEEMAN v. COOK.

(48 Vt. 201.)

Statute of limitation — when runs on note.

Action brought December 24, 1874, on a promissory note dated December 24, 1867 payable one year from date and not entitled to grace. It did not appear that there were a demand and refusal of payment on the day the note fell due. *Held*, that the statute of limitation of six years had not run, and that the action was well brought.

ACTION of assumpsit brought December 24, 1874, on a promissory note, dated December 24, 1867, payable to the plaintiff or bearer one year from date. Plea the statute of limitation.

E. A. Sowles, for plaintiff.

W. F. McGettrick, for defendants. The only question in this case is, when did the Statute of Limitations begin to run ? Did it begin to run the day the note fell due, December 24, 1868, or not till the day following,

December 25, 1868? If, as we claim, the statute began to run December 24, 1868, then it is a bar to the action, which was not commenced till December 24, 1874, the full term of six years having expired. The statute begins to run when the cause of action accrues; and the cause accrues with reference to a promissory note, when the note falls due 2 Parsons on Notes and Bills, 639, 640; Story on Prom. Notes, 277, and notes; *Staples v. Franklin Bank*, 1 Metc. 43; *Ohurch v. Clark*, 21 Pick. 310; *Whitewell v. Brigham*, 19 id. 117; *Crofoot v. Moore*, 4 Vt. 204; *Grafton Bank v. Doe*, 19 id. 463; *Harrington v. Rathbone*, 11 id. 58; Angell on Lim. 90.

The period of limitation begins to run, on a promissory note payable on demand, the date of the note. On this the authorities are unanimous, and the decisions uniform. *A fortiori*, on note payable one year from date, as in this case, the statute begins to run the day it falls due. 2 Parsons on Notes & Bills, 630, 643; Angell on Lim. 93; *Kingsbury v. Cutler*, 4 Vt. 458. Negotiable bills and notes are uniformly treated as an exception to the general rule that a debtor has till the last hour of the day on which his debt falls due to pay it. Story on Prom. Notes, 281 But, if it should be held that a demand is necessary to make that exception in the case of a promissory note, then there is a presumption arising from the lapse of time that a demand was made. *Kingsbury v. Butler*, *supra*.

PIERPOINT, Ch. J. The note upon which this action is based is dated the 24th day of December, 1867, and payable one year from date. This action was commenced on the 24th day of December, 1874; and the only question is, whether the action is barred by the Statute of Limitations; and that depends upon the question whether the plaintiff's cause of action accrued upon the day the note fell due, or only at its close. The note is not made payable at a bank, or at any particular place; it is not indorsed, nor was it negotiated, and by our law the maker was not entitled to grace. These facts divest this case of those questions growing out of the necessity of making demand, protest, notice, etc., for the purpose of charging indorsees, etc., in the determination of which, the course of business in the mercantile and banking community forms an important element, which questions have led to much discussion that has resulted in many and conflicting decisions. The authorities all agree, that in computing the time that a note payable at a future day has to run, the day of the date is excluded. The rule is also well settled, that when, by the terms of a contract, it is to be performed by a party upon a particular day, such party has the entire day in which to perform

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it. But it is said that an exception to this rule prevails in respect to negotiable paper; and in many cases outside of this State, it has been held that upon a demand being made during the ordinary and regular business hours, and a refusal or neglect to pay, the right of action then accrues, and a suit brought thereafter upon the same day may be maintained. But we know of no case where it has been held that such action could be maintained without such demand and refusal; on the other hand, such demand and refusal seem to be regarded as indispensable.

In this case there is nothing to show that there was such a demand and refusal, even if in a case like the present that would have been sufficient. On that we express no opinion.

It is claimed that in this case the court should presume a demand and refusal from the lapse of time. This we cannot do. No demand was necessary to perfect the party's right of action at the close of the day of payment; and to presume that the party made a demand with a view of perfecting his right a few hours earlier, from the fact that he neglected to enforce his right when it was perfected, for almost six years, would be going quite too far in aid of this defense. The fair inference would be the other way. Upon the view we take of this case, the plaintiff's right of action accrued at the close of the 24th day of December, 1868, and that right would be barred by the Statute of Limitations at the close of the 24th day of December, 1874. As this action was commenced before the close of that day, it is not barred by the statute, and the plaintiff is entitled to recover.

Judgment affirmed.

JEROME v. SMITH

(48 Vt. 230.)

Railroad — ejecting passenger who has lost his ticket.

Plaintiff bought a ticket over defendants' road with coupons attached. A conductor detached one of the coupons and gave him instead a conductor's check. Before reaching the point for which such check was given, another conductor took the train and demanded the check. Plaintiff could not find it, but tendered him the ticket with the remaining coupons, which was refused, and plaintiff was ejected, without unnecessary force. *Held*, that defendants were justified. *

ACTION on the case against defendants, receivers and managers of the Vermont Central and the Vermont and Canada Railroads, for ejecting plaintiff from a passenger train.

* See *Pullman Palace Car Co. v. Reed*, 20 Am. Rep. 232.

Plaintiff purchased a ticket of defendants' agent, from Worcester, Mass., to Montreal. To this ticket were attached three coupons; one from Worcester to White River Junction, Vt.; one from White River Junction via the Vermont Central to St. Johns, Canada; and one thence to Montreal.

One of the coupons was detached before reaching White River Junction. Upon leaving that place the conductor detached the coupon to St. Johns and in lieu thereof gave plaintiff a conductor's check. Before reaching St. Johns another conductor took charge of the train and asked plaintiff for his ticket. Plaintiff could not find the conductor's check, and stated the facts and showed the conductor his ticket, with the remaining coupon attached. The conductor demanded the fare, and that being refused ejected plaintiff at the next station, using no unnecessary force.

In taking up the coupon and substituting the check, the conductor acted pursuant to defendants' instructions that had never been made public, and of which plaintiff had no knowledge; and plaintiff had no knowledge of any of defendants' rules, and had never been over their roads before. There was no evidence that plaintiff knew there was to be a change of conductors after passing White River Junction. Defendants had a rule that if passengers refuse to pay fare, conductors might put them off the train in compliance with the laws of the State, using no unnecessary force; but this rule was never made public, and plaintiff had no knowledge of it.

Upon the foregoing facts, the defendants requested the court to direct a verdict for them; but the court refused, and they excepted.

The court submitted to the jury to find what damage plaintiff had sustained by the act complained of, assuming that he was unlawfully ejected. The plaintiff claimed that he was entitled to recover exemplary damage, and the court so ruled, *pro forma*, to which defendants excepted.

The jury returned a verdict for \$2,000 damages.

The court rendered judgment for the defendants, to which the plaintiff excepted.

E. A. Sowles, H. S. Royce, and R. O. Sturtevant, for the plaintiff.

Noble & Smith and Edson, Rand & Edson, for the defendants.

WHEELER, J. Question had been made about the admission of some of the evidence, because not covered by the notice of defense. But this is an action of trespass on the special case, and not *vi et armis*, and in

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this form of action any thing is admissible in evidence, without plea or notice, that would show that the defendants were not guilty of any thing actionable in respect to the matters charged in the declaration, although if the action was in the other form, it might have been necessary to plead the same matters specially. Such matters, if material at all, would show that no cause of action ever existed, and not that one which did exist had been discharged, and would not be such as the statute requires notice of to be given, and there was no error in admitting the evidence.

As the case states that certain facts appeared on the trial and others were found by special verdict, it hangs here upon the correctness of the judgment rendered upon all these facts. If on these facts the plaintiff was wrongfully in the defendants' cars at the time he was expelled, the judgment was right, otherwise not. The right to eject for non-payment of fare is given by statute, if statute authority can, in addition to common-law rights in such cases, on any ground, be necessary. The real question is, whether there was in fact such non-payment. When the plaintiff bought the ticket at Worcester with coupons attached, entitling the holder to ride over that part of the defendants' road he was riding on when ejected, he did not make any agreement with them or their agents that they would carry him in person over it as carriers agree to carry particular packages over their routes ; but he bought what was symbolic evidence of a right that whoever should have it might ride, and what any other person could use as well as he. The title to it, and right to a passage upon it, would pass by mere delivery, and whoever should have it, could pay the fare of a passenger with it by delivering it in payment ; but the mere fact of having had it, without having it to deliver in payment on reasonable request, would not entitle any one to the passage, any more than having a sufficient amount of money to pay the fare with, without paying it, would. When he entered on his passage over the defendants' road, he had the coupon and tickets which would pay his fare throughout his intended journey over their line, and if he had delivered the coupon to the conductor in payment of his fare for the whole of that journey, he would have had the right to ride the whole distance without doing or paying any thing more. But according to the facts, the conductor did not take the coupon as an equivalent for the full passage, but only for the passage so far as he was to go as conductor, and gave the plaintiff the white check as evidence in lieu of the coupon, more symbolic, but equally effective, of the right to a passage the rest of the way. As the plaintiff did not know what the symbols on the check each meant, so probably he did not know what those on the ticket and on the coupon respectively meant ; but, however that may have been, such checks are

in common use among conductors on railroads, as evidence of the right to a passage, and the case not only does not show but that he understood what the purpose and effect of this one was, as persons ordinarily would, but does impliedly show that he did so understand, because it appears that he searched for it to use to pay his fare with when he saw the next conductor approaching him collecting fares. And although it was delivered to him only by placing it in his hat band, as he did not object, that was as much a delivery to him as placing it in his lap or in his hand would have been, and was sufficient to invest him with the ownership of it, and to bind him to take care of it, as of his own property. While he held that check he had not paid his fare beyond where that conductor was to go, but had what would pay it, or that of any other person, the rest of the way. If the conductor had not given him any thing, or had given him something that he could not use, to pay his fare with, he would have received no equivalent for his coupon, and would have still been entitled to his passage, for an equivalent. But as it was, what he took was as good as the coupon for the rest of his journey, and with it he was situated the same as if he had kept the coupon, or as if he had bought the check of a station agent or conductor at the commencement of his journey, as evidence of his right to a passage, and shown it to one conductor and was keeping it to show to the next one. In either case, the duty of keeping it safely would be upon him. When he had lost it, the loss was his, and he was situated as he would have been if the coupon had been returned to him and he had lost that, and as any one would be who had bought a ticket to an opera or a lecture, or that would entitle the holder of it to any other privilege, and had lost it. Having lost it, he was called upon by the proper conductor to pay his fare. He had not any ticket or check to pay it with, and refused to pay it in money, consequently, there was a refusal to pay it at all, and the conductor rightfully expelled him from the train.

The books and cases cited in behalf of the plaintiff are not, apparently, contrary to these views. Thus, in *Pittsburgh R. R. v. Henningh*, 39 Ind. 509, the first conductor took up the ticket and gave no check nor any thing showing a right to a passage, and the next one ejected the passenger for want of any thing to show payment. The company was very properly held liable for that expulsion. In *Palmer v. Charlotte R. R. Co.*, 3 S. C. (N. S.) 580; S. C., 16 Am. Rep. 750, the plaintiff had a ticket which gave him the right to stop over at Columbia; the conductor took it up and gave him a check that did not show any right to stop over. He stopped over, and on presentation of the check on the next train, was expelled. The court said that the conductor had no right to take up the

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ticket unless he placed the passenger in as good condition as he was in before, by giving a check or token evidencing his right to stop over and take a subsequent train. In *Maroney v. Old Colony R. R. Co.*, 106 Mass. 153 ; S. C., 8 Am. Rep. 305, the plaintiff had a ticket that was purchased of the agent of the defendants, and was apparently good for any regular train, and he was ejected from a regular train because by some rule, of which he had no notice, it was intended only for a special train. In *Hamilton v. Third Av. R. R. Co.*, 53 N. Y. 25, the plaintiff paid his fare and received nothing to show he was entitled to a passage, and was ejected before he had the passage for which he had expressly paid. In *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465, the plaintiff had bought a ticket and given it up on his passage without receiving any evidence of a right to a passage in return, and was expelled before he had the rest of his passage. The other books and cases cited for the plaintiff, so far as observed, relate to the general rules of liability of carriers in respect to the persons and baggage of passengers who have with money or by ticket paid for and entered upon passage for some particular journey, and do not bear directly upon the question in this case. On the other hand, numerous authorities among those cited in behalf of the defendants sustain these views more or less directly. Among those most nearly on point, are *Hamilton v. N. Y. C. R. R.*, 51 N. Y. 100 ; *Standish v. Narragansett Steamship Co.*, 111 Mass. 512 ; S. C., 15 Am. Rep. 66 ; *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295 ; S. C., 15 Am. Rep. 419 ; *Duke and wife v. G. W. R. R. Co.*, 14 Up. Can. C. P. 369. According to these conclusions, the judgment for the defendants was correct.

This result makes it unnecessary to say any thing about the *pro forma* ruling as to exemplary damages. It may, however, be proper to remark, that if the ruling was as it is stated in the exceptions to have been, that the plaintiff was *entitled* to such damages, it was probably erroneous, for it is not understood that a plaintiff in any case has any legal right to them. *Earl and wife v. Tupper*, 45 Vt. 275. If, however, it was only ruled that the case was one in which such damages might be given if the evidence and finding of the jury would warrant, there probably was no error

Judgment affirmed.

DEAN V. MCLEAN.

(48 Vt. 412.)

Action — when tort will lie for damages arising from contract.

Defendant had by contract the right to float logs through plaintiff's dam, and was bound by the same contract to repair and pay all damage done by him. *Held*, that he was also liable to trespass on the case for damages negligently done by him

ACTION of trespass on the case for damages to plaintiff's mill dam, flume, etc., occasioned by defendant's negligence in floating logs through them.

The declaration set out a contract between the plaintiff and defendant whereby the defendant had the privilege to float logs through plaintiff's mill dam, flume, etc., and alleged that defendant had so negligently exercised his privilege as to damage plaintiff. Under the contract the defendant was to repair and pay all damage done. Plea the general issue. The evidence tended to support the declaration and plaintiff had a verdict.

Miner & Beebe, for plaintiff.

Charles N. Davenport & J. K. Batchelder, for defendant.

BARRETT, J. The burden of the debate in this case is, whether this action on the cause *ex delicto* can be maintained upon the cause of action shown by the facts stated.

The defendant caused the damage through faulty negligence in doing what he was entitled to do under his contract with the plaintiff, viz., to open the bulk-head and run the logs through the dam to float them down the stream. As a part of that contract he had expressly agreed to pay a stipulated sum for leave so to do, and also "to repair and pay all damage in consequence of opening the bulk-head and running the logs through."

Does the contract preclude the plaintiff from maintaining this action? It is shown by the books, and is conceded in the argument, that in some cases remedy may be had by action *ex contractu* or *ex delicto*, at the option of the plaintiff. In 1 Chit. Pl. 133, it is said that the torts for which an action on the case may be maintained, "are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties or of some

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express or implied contract between them." On page 135: "If a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." On page 140: "Where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case or on the covenant against the lessee for willful waste done by him during the term." In *Kenlyside v. Thornton*, 2 Bl. 1111, DeGREY, Ch. J., says: "Tenant for years commits waste and delivers up the place wasted to the landlord. Had there been no deed of covenant, an action of waste, or of case in the nature of waste, would have lain. Because the landlord, by the special covenant, acquires a new remedy, does he therefore lose his old?" 2 Saund. 252 c, note.

In the present case, it is very plain that if nothing had been said by the defendant by way of agreeing "to repair and pay all damage," it would have been his duty to exercise reasonable care and prudence in acting under the leave obtained of the plaintiff for the stipulated compensation. Such duty would have arisen upon the facts — a duty imposed by law; and for the violation of, or failure to perform, that duty, the defendant would have been liable by action on the case to respond for such damage as the plaintiff should have suffered by reason of such failure or violation. The duty in that respect is not different by reason of the promise to repair and pay all damage. It would be absurd to construe the transaction between the parties as giving the defendant the right to destroy the plaintiff's dam by the running of his logs through the bulk-head; absurd to infer that either party contemplated such a result from the running through of the logs; and absurd to hold that the agreement to repair and pay all damage in consequence thereof was intended or thought of as covering such a consequence of the faulty negligence of the defendant in the manner of conducting the business. It is reasonable to suppose and to hold that that stipulation looked only to such natural and necessary damage as should result as a consequence of running through the logs in the exercise by the defendant of reasonable care, and by no means to the destruction of the dam in consequence of the culpable carelessness of the defendant.

In this view, no reason, either substantial or technical, can be assigned against the right of the plaintiff to assert his claim for damage caused by defendant's carelessness, in the present form of action. The terms, and the logical result of what has been cited and referred to, favor that right. The analogies of many decided cases favor it. For more than a hundred years it has been settled that assumpsit or case may be maintained against common carriers. By stating that the defendant carried

for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract; and so an action of *assumpsit* may be maintained, or the *gravamen* may be alleged as consisting in a breach of duty arising out of an employment for hire, and such breach of duty considered as a tortious negligence, and so an action on the case, *ex delicto*, may be maintained. Selw. N. P. 429. See *Bank of Orange v. Brown*, 3 Wend. 158.

In Addison on Torts it is said: "A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract, so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought, at the option of the plaintiff. When there is a violation of any legal right existing independent of any contract between the parties, such as invasion of a right of property, or of the right of personal security, or an injury to character and reputation, then the tort is not founded on contract, and an action *ex delicto* is alone maintainable. Whenever an action of tort is founded on contract, an action is maintainable for nominal damages, although no actual damage can be proved; but the plaintiff must be a party to the contract; for no person can sue in respect of a tort founded on contract who was not a party or privy to, and could not have sued upon, the contract." We therefore hold that the declaration, and the evidence in behalf of the plaintiff, make a case in which the plaintiff would be entitled to recover. We make no suggestion of views, how the judgment in this case would affect the right to maintain another action for the liability of the defendant in other respects.

A moment's attention to the criticisms of the charge will show that they are not well founded. It is apparent that but a small part of what was said to the jury by way of charge is given. From our own experience and observation, we assume that what is given as the substance of the charge, is a memorandum, constituting the substratum of what was a full charge, developing that substratum into all needful detail of explanation, illustration, and application, having reference to the cause of action set forth in the declaration and shown by plaintiff's evidence. This answers the imputed fault, that "the court told the jury in general terms," etc., "without vouchsafing any explanation," etc., "that the charge is silent as to the duty of plaintiff to prove his case," — "ordinary care" and "common care" — and as to the 8th request. It is reasonably to be supposed, unless the contrary appears, that the charge, when fully reported, would show that it was made with reference to the declaration and the evidence. It is plain that what is stated as the "substance," is

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susceptible of being rendered into a just and legitimate charge in detail, and a full and proper answer to all the proper requests set forth in the bill of exceptions.

The objection to the evidence is fully answered by ROYCE, J., in *Clifford v. Richardson*, 18 Vt. 620, 626-7. The cases cited by defendant are not at variance with that case, nor with the admission of the evidence in the case in hand. The running of the logs in that stream, and through that bulk-head, was not a matter of common knowledge, nor of adequate common judgment upon the facts shown by the other evidence. The experience and observation of the plaintiff gave him the grounds and faculty of an opinion peculiar to himself, and not common to men who had no such experience or observation. In a substantial sense he may be regarded as an *expert*, having peculiar knowledge and skill, which renders his opinion worthy of consideration as the ground of judgment and opinion in others who have not such knowledge and skill.

Judgment affirmed.

 FERRITER v. TYLER.

(48 Vt. 444.)

School — right to exclude from, for non-attendance — what will not excuse non-attendance.

A school committee, which was authorized by statute to adopt all requisite measures for the regulation of the school, excluded children from the school for absence contrary to the rules thereof. *Held*, valid, although such absence was pursuant to the command of their Roman Catholic parents and their priest, and for the purpose of attending religious services on a holyday of the church.

BILL in chancery to restrain the defendants, the prudential committee of a school district, from further excluding the orator's children from said school. The opinion sufficiently states the facts.

E. W. Stoddard and G. W. Davenport, for orators.

J. M. Tyler and R. W. Clarke, for defendants.

BARRETT, J. It seems expedient to settle in the outset the scope and limits of the case that is before us. The case is made by the bill and answer. Such facts alleged in the bill as are admitted, or are not denied

by the answer, are to be taken as established. Such facts stated in the answer as are pertinent to the subject-matter and grounds of the relief sought by the bill are to be taken as established. It thus is shown that the orators are members of the Catholic church in the village of Brattleboro, that Father Lane, the priest of said church, acting in behalf of the orators, on the morning of June 4th, 1874, sent to the defendants, who were the prudential committee of the school district in that village, this note :

“ You will confer a favor on us Catholics by exempting the Catholic children from attending school on all holydays. I should have called and explained our reasons, but have not had opportunity as yet.”

It was received by the committee about ten minutes before the time of commencing the forenoon session of the schools on that day. The committee immediately replied by written note :

“ Your note is just received. To comply with your request involves closing two of our schools, and greatly interrupting several others. This we never have done and cannot do. We have great pride in our schools, in which the Catholic children are treated as well as any.”

The bill states that the 4th day of June is considered, regarded, and set apart as a holyday by said church and denomination ; that it has been the custom and immemorial usage of all good and devout Catholics to attend divine service on that day ; that they were directed by their spiritual adviser, the priest of said church, to attend religious services on that day, and have their children do so.

It is stated in the answer that the defendants had no knowledge or information, except from the bill, that said 4th of June was regarded by Catholics as a holyday, or that they were bound in conscience, or by the rules of their church, to attend religious services on that day. It appears by the answer that on the day before, the Catholic children in the different schools informed their teachers that they should not attend school on the next day, that it was a holyday, as some of them said, and as others said, a holiday, and that they had been directed by their priest that they were to attend services at their church on that day, the teachers replying that they could not be excused for that purpose ; that one of said teachers informed the committee on that day of the proposal of her Catholic scholars to be absent to attend church the next day ; that on the morning of said 4th of June, five or six of such scholars called on the committee and said they had heard that the committee would not excuse

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them, if they were absent to attend church on that day, to whom the committee replied that they had not been requested to excuse them, and that they could not have done so if they had been requested; that said children went to their priest and soon returned with the note from him above recited.

The foregoing constitutes all that passed by way of application or request to the committee and teachers for permission to be absent from school on said 4th of June. And there was nothing more tending to show that the priest sent said note by the request of the orators, or that the committee knew he was acting by their request in sending it. Some sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on said 4th of June, being, as stated in the bill, "holy *Corpus Christi* day." A few of them applied for admission to the schools in the afternoon of that day, and all, or nearly all, so applied the next morning, when they were told by the committee that, as they had absented themselves without permission, and in violation of the rules of the school, which they well understood, they could not return without an assurance from their parents or their priest that in future they would comply with the rules of the schools, the committee assuring said children and many of their parents and also the priest, that if said schools would not again be interrupted in like manner, they would gladly admit said children to them; that said priest and parents refused to comply with such proposal, and claimed that on all days which they regard as holy, they may, as matter of right, take their children from the schools, without any regard to the rules thereof, or to the injury they thereby do to them; that there are eight or ten of such holydays in each year, six or seven of which usually occur when said schools are in session; that never before the present instance have the Catholic children been taken from the schools to attend any religious service at their church, nor had any claim of right to so take them been asserted by their parents or the priest; that the laboring Catholic men and women in the village were generally at their accustomed places of business and labor during the day, and labored as on other days, and many of their children were at play in the streets and elsewhere during that day; that some four years before, the priest, Father Halpin, asked of the committee the privilege of taking all the Catholic children from said schools to attend some service at their church on a certain day, which was denied him, and on its being explained to him how injurious to the schools the granting of the request would be, he withdrew the request, and always held services at his church at hours that would not conflict with the sessions of the schools; that up to said 4th of June, about 150 Catholic children

were attending said schools, distributed through all grades and classes thereof, the whole number of scholars being about 600; that for more than ten years the committee have required as a rule for the regulation of said scholars and the improvement of the scholars in learning, that those registered as scholars for a given term should be constant and regular in their attendance, and not be absent except by permission of the teachers or the committee on reasonable cause shown; and for the enforcement of the rule, and to secure such regular attendance, the committee have claimed the legal right and authority to suspend from school during the remainder of the current term, scholars who violated said rule, and have exercised such authority whenever they have judged it necessary for the good of said schools.

The bill states that the orators, by themselves and their priest and their solicitors, had repeatedly requested the committee to allow said children to return to and attend said schools. The answer denies that they have so done, except under a claim of right to take said children from the schools whenever their priest requires them to attend church on days that they regard as holy. The bill states that the children of the orators and other children reared in the Roman Catholic faith, to the number in all of one hundred and fifty, are now (when the bill was made) prohibited from attending any public school in the district. The answer replies, that on the 5th day of June, three or four Catholic parents (not any of the orators) whose children had been absent the day before, told the committee that their children should thereafter comply with said rule; whereupon said children were immediately permitted to return to the schools, and all would have been gladly permitted to return upon like assurance; but in a few days said children, with some other Catholic children who were not absent on said 4th of June, and in no way prevented from attending the schools, were, as the defendants were informed and believe, by direction of said priest, withdrawn from the schools, and had not since attended.

The ground and reason of the *exemption* asked for in this case, as stated in the bill, are, that the parents of said children were members of the Catholic Church, and that they were directed by the priest of said church to attend religious services on said 4th day of June, and have their children do so, as already more fully stated. The *legal* ground and reason of the relief prayed for are indicated by the expressions in the bill, namely, "their (the orators') constitutional right to worship God according to the dictates of their own consciences, without being abridged in the enjoyment of their civil rights," and their "right to exercise parental authority and government over their children as regards their moral training and culture" — which, when put in the form of direct and explicit statement, is, in effect,

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that the enforcing of the rules of suspension by the committee upon the children of the orators, violated the rights of the orators under Art. III of the Constitution of the State, and violated also the legal right of the orators to control their children in the matter of attending the public schools of the district, as against the right of the committee in the same behalf.

It is the duty of this court to decide whether either of these propositions is maintainable. The article in the Constitution on which the former of these depends is: "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, etc., contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and no authority can or ought to be vested in or assumed by any power whatever that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship; nevertheless, every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship which to them shall seem most agreeable to the revealed will of God." In the light of that article, the former of these propositions, if critically considered in its relation to the case made by the bill, obviously cannot be maintained; for the action of the committee touches not nor affects the worship of Almighty God by the orators, whether such worship be one way or another, or not at all; nor does it touch or affect their religious sentiments or peculiar mode of religious worship; nor does it in any manner interfere with or control the rights of conscience in the free exercise of religious worship. That article in the Constitution looks only to the personal conscience of the individual, as related to his personal worship of Almighty God. It looks only to the personal relation of the individual to his God, both as to belief and worship, and not to the relation that the individual may sustain to others in respect to their belief and worship. The not consenting that the children of the orators might leave the schools for the purpose of attending divine worship on the day in question, did not touch the belief of the orators as to the character of that day, nor did it touch or control the free exercise by them of religious worship according to their belief and conscience, nor is any thing to that effect alleged or intimated in the bill.

Still further, it may be remarked that the bill does not present it as a matter of conscience either with the orators or their children, that the

children should attend service on that day ; but only represents that it is a holyday in the church, and accustomed to be observed as such. No divine authority for it is quoted or asserted, and its observance, in this instance, by the orators and their children, by attending religious services, is put upon the direction of the priest, without showing or asserting that any thing of religious conscience was involved in obeying or not obeying that direction. Yielding to supervening authority exercised by a recognized superior is one thing, but it is not necessarily nor impliedly the same thing as obedience to the dictates of the inward monitor and avenger.

Again, when the facts set forth in the answer are considered, it seems very apparent that only the attendance of the orators' children on the morning session of the schools on that 4th of June, involved any matter of conscience in relation to the day ; for many Catholics in the village were about their accustomed business and labor during that day as on other days, "and many of their children were at play in the streets and elsewhere during that day," and some of the scholars that had been taken from the schools to attend the religious service, presented themselves for attendance in school in the afternoon. Hence, as to the matter of fact as shown by the bill and answer, it would be very difficult to find that the observance of the day is binding on the Catholic conscience ; and the bill and answer furnish the only legitimate evidence we have on that subject ; and this difficulty is considerably enhanced by the fact that up to the 4th of June, 1874, that conscience had never caused it to be required that the Catholic children should be absent at all from the schools on that day.

It is proper also to state explicitly, that if the action of the committee, either in the making or the enforcing of the rule, was unlawful in this instance and was the subject of remedy by suit in chancery or at law, such suit should not be in the name of the parents, but of the children, as the real party plaintiff.

What is thus presented seems to show sufficient ground and reason for holding that the bill cannot be maintained on the proposition as to the constitutional rights of the orators. But having regard to the character of the subject, and to the scope of the arguments that have been addressed to us, we are disposed to consider that proposition in a broader view.

To this end, suppose the children of the orators to be the orators, and to have set forth as true of themselves all that the bill contains as to the church, and the day, and their priest, and the application to and refusal by their teachers and the committee, and the attending on the religious services, and the being excluded from the schools, and the action of the committee in respect thereto, and to have been answered in every material

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respect as the bill of the orators is answered ; in such case, the ground of complaint and remedy would be, that their (the children's) rights under Art. III had been violated by the action of the committee. Could it be maintained? This is really the question which counsel for the orators seem to regard as being before the court.

This brings into consideration the scope and purpose of that article of the Constitution. It is noticeable as bearing on the subject, that this is the first instance of the assertion of what is now claimed for that article. The article was in the original Constitution of 1777, and has been continued from that time to the present. In that original Constitution, also, the 40th section was, "A school or schools shall be established in each town by the legislature, for the convenient instruction of youth," etc. By the revision of 1785 — ratified in 1786 — that article was changed in phrase, but not in sense or effect, and thus it has remained, being section 41 in our present Constitution. The legislature, in pursuance of said provision of the Constitution, has been continuously making provision for such schools ; and such schools have existed and been in operation in all the towns in the State down to the present time, with great variety of detail as to organization, administration, and requirement, even to compulsory attendance by force of specific enactment. While those two articles have thus, side by side, been in force to every practical intent, all forms of religious belief and unbelief, characterizing the various sects and denominations of men relatively to religion, and all forms of church organization based on such forms of belief, have been in existence and operation, with all the details of religious worship and service professedly involving the conscience and its demands peculiar to each differing sect, and yet this is the first instance in which it has been asserted that the administration of our common public schools, under the cotemporary constitution in that behalf, and the enacted laws, has violated any rights accorded by said Art. III. It is to be noticed still further, that while those two articles have been in force, and the successive legislatures have been enacting laws under which schools have been going on through the immediate agency and action of committees and teachers vested with the same official authority as those now in office, councils of censors, charged by the same Constitution with the duty of noting infractions of that instrument by the legislature, and vested with the function of initiating alterations of the Constitution itself, have been chosen and in official action every seven years, and yet nobody has suggested that the legislation under section 41, or the action of committees and teachers under that legislation, or that section 41 itself, has trespassed on anybody's rights of conscience under said Art. III. This is stated, not as

showing that the action of the committee in this case did not violate such rights, but as showing that the present claim for that article by these orators is of novel impression, as we say of a proposition or question of law when for the first time presented for judicial consideration.

It now behooves that we should call to mind what, as matter of history, was the occasion and what the purpose of that Art. III. The history of the Puritans in England, and especially of those who were known as the New England Pilgrims, shows the occasion; and in this regard it is in point to refer to the religious history of the continent of Europe for several centuries next prior to the formation of our government. The government of England and the governments of the continent had no written, organic constitutions defining the powers of the governing authority on the one hand, and defining and guaranteeing the rights and privileges of the subject on the other. The subject lived in subordination to the law-making and law-executing power — he individually, or all the subjects collectively, not being recognized as having rights and privileges, only as they should be accorded to them by those powers. The British idea of the British government was sharply expressed in 1775, in the answer written by Dr. Johnson to the resolutions and address of the American Congress — “that the King and Parliament have the power of disposing, *without the consent of the subjects, of their lives, liberties, and properties.*” (The italics are in the authentic print.) Sovereignty was not derived from the subjects, but it supervened upon them by “*divine right,*” in the form and character of what was called “*the government.*” Church and state were indissolubly connected, the church dogmatizing the faith, and the state enacting it into legal requirement, with disabilities and penalties. The disabilities on the score of religious faith and practice which subjects were made to experience — the penalties which confronted non-conformity in England — the horrors which haunted and avenged imputed heresy, at times, both in England and on the continent, had made those who were not of the religious faith required or approved by the governing powers, and who for that reason had gone forth to the desolations of the desert and the wilderness to escape the eye, and ear, and arm of such powers, feel and appreciate the importance, in creating governments for themselves, of seeing to it that such governments should not have the *right*, at least, to subjugate them to like disabilities, penalties, and horrors.

In the first Constitution of the State of New York, drafted by John Jay, chairman of a committee of his peers in character, and some of them in ability and learning, and adopted on the 20th of April, 1777, with but one negative vote in the convention that framed and established it, Art.

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88 — corresponding to Art. III in our Constitution of the same year — shows in direct expression, the occasion and purpose of the article — an occasion and purpose common to the colonies then just enfranchised by the Declaration of Independence. I copy thus: “And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against the spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind. *Provided*, that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this State.”

When our Constitution was first framed and adopted, no occasion had been given for regarding the grievance that is now complained of; so, such grievance could not have been in mind as an object specially to be provided against in the making of that Art. III. On the other hand, the government-making people of New England, in the causes that had led to its first settlement by the Pilgrims, and by their children, and by after emigrants and *their* children, had ever deep and fresh in mind occasion and reason for the provisions of that article. And nothing could more fully, pointedly, and specifically indicate the nature of such occasion and reason than the language of the article itself. It was designed by it to secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant — his being a Calvinist or an Armenian — his being an orthodox evangelical or a free-thinker — his being a Baptist or a Universalist — an Episcopalian or a Quaker, should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice, — so that no law should be aimed or executed against him because he professed and practiced one form of religious belief or disbelief rather than another, within the limits of personal immunity consistent with good order and the peace of society under the government. It was designed to debar the law-making and law-administering powers from enacting or adjudging that unless the subject should profess a prescribed system of faith and become a member of a prescribed religious organization, and conform in his worship to the prescribed ritual, he should not be entitled to the same personal rights, privileges, and enjoyments under the government as those who should do

so. It was designed to secure absolute equality before the law of all subjects under the law, whatever might be their faith or notions in the matter of religion. And as a result, may not a Catholic be a Catholic as freely as a Protestant may be a Protestant, with no law aimed at him because he is a Catholic and not a Protestant? It would seem to be trifling with a momentous subject, to claim that Art. III was designed to prohibit the legislature from enacting any law, the carrying into effect of which might interfere with the wishes, and tastes, and feelings of any of the citizens in the matter of religion, and even with the performance of religious rites that should be regarded as matter of conscientious duty on the part of some of the subjects of the realm. Government, with reference to the ends designed to be secured and served by its existence and action, is altogether a practical matter—not speculative, fanciful, sentimental, or impracticable. It performs its functions, and works out its results, by the instrumentality of laws enacted and laws administered,—laws adapted to the subject-matter of them, and to the accomplishing of the ends designed, and operating equally and alike upon all who come within their scope.

One of the chief ends of the government is, to provide means and facilities for developing and educating and training the young into virtuous and intelligent men and women. This is recognized and emphasized by the section of the Constitution already referred to as to schools, and which since 1786 had been in these words: “Laws for the encouragement of virtue and prevention of vice and immorality, ought to be constantly kept in force and duly executed, and a competent number of schools ought to be maintained in each town for the convenient instruction of youth.”

As already suggested, the Constitution proceeds upon the assumption that this can be done consistently with Art. III. In pursuance of that assumption, the legislature, through the whole course of our existence as a State, has been active and earnest and considerate in the making of laws for the existence and support and management of what is meant by “schools in each town.” In so doing it has never aimed to make, nor has it ever made, any provision that discriminates or distinguishes in its operation between persons of different religious sects. All are subjected alike to the law and its administration. The Methodist, who regards his camp-meeting as demanding as much of his conscience as the Episcopalian does his Christmas or Lent; the Episcopalian, who regards the feast and fast-days of his church as demanding as much of his conscience as the Catholic does his holy *Corpus Christi*; the Congregationalist, and Presbyterian, and Baptist, and other sects, who care for none of these

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things, and whose prayer-meetings and protracted meetings demand as much of their consciences as in the case of the others before named, and the man of no preference and no religion, *all*, and all their children, are subjected alike to the school laws, and to their administration.

Art. III was not designed to subjugate the residue of the Constitution, and the important institutions and appliances of the government provided by the enacted laws for serving the highest interests of the public as involved in personal condition and social relations, to the peculiar faith, personal judgment, individual will or wish of any one in respect to religion, however his conscience might demand or protest. In that respect it is implied that while the individual may hold the utmost of his religious faith, and all his ideas, notions, and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others, and to the paramount interests of the public as depending on, and to be served by, general laws and uniform administration. Rights of conscience and schools, under the Constitution, were, when that instrument was made, and have been during all its continuance, to be harmonized with practicable consistency — the schools under section 41 not to be subordinated to the rights of conscience under Art. III, any more than the rights of conscience under Art. III are to be subjected to the rights as to schools under section 41.

By the revision of 1786, that section 40 was incorporated into said section 41, immediately after the first clause, as is shown by section 41 of our present Constitution, already recited. From all which it is plain that in those early times, *religion* and *learning*, under the Constitution and the laws to be enacted, were deemed to be compatible, and that schools of all grades from the "schools in each town" to the university, were to be the subjects of legislation under the Constitution; and it is especially plain that the "schools in each town," as early as 1786, were combined with, if not given the precedence to, *religious* societies and bodies of men, as an instrumentality of the government, by means of laws, "for the encouragement of virtue and prevention of vice and immorality." In conclusion on this topic, as we cannot improve so we adopt the language of Judge POLAND, in *Williams v. School District in Newfane*, 33 Vt. 275: "Without making further reference to the almost numberless acts of the legislature exhibiting the most active watchfulness and fostering care for the cause of popular education, enough has already been stated to shew that the whole subject of the maintenance and support of our common schools has ever been regarded in this State as one, not only of public usefulness, but of public necessity, and one which the State in its sovereign character was bound to sustain."

We now proceed to remark, that it stands out so plain as not to be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the Constitution in their behalf, must be subjected to system and order under established rules. Hence, the law charges the committee with the duty of "adopting all requisite measures for the inspection, examination, and regulation of the schools, and the improvement of the scholars in learning." Gen. Stats. 22, § 39.

Let it be granted that parents and others may, upon their own respective reasons, control the attendance of the scholars, as against the official right of the committee in that behalf, and practically, the ground of system, and order and improvement, has no existence. For the parents and guardians of the scholars may, each on his own motion, and on his own notions, withhold their respective scholars from the schools. In this respect, so far as its effect on the schools is concerned, it makes no difference whether the occasion and motive involve conscience, will, whim, or the pocket. Now, when this matter of conscience, as against the requirements of the law, is brought to the test, the practical result of what is claimed by the orators in this case is shown to be so impracticable, not otherwise to characterize it, as to preclude further discussion. If a Catholic citizen should be serving on a jury in the midst of a trial, when divine service in his church on holy *Corpus Christi* should be in progress, would it be a violation of his rights under said Art. III to compel him to keep his seat and serve through the trial? The same may be asked of the Jew or the seventh-day Baptist, who should be required to do like service on Saturday. The same may be asked of a devout Methodist, when a camp-meeting or a love-feast should be in progress in his vicinage. If either or all should refuse to serve, would their rights of conscience under Art. III be a valid defense in a prosecution for the penalty in such case provided? Suppose a Catholic sheriff should have in his hands some process that it became his *official* duty to serve during the time that divine service in his church on some holyday should be in progress, would his rights of conscience under Art. III be a good plea in bar to an action for official default by reason of attending said service "for conscience sake," instead of making service of the process? But enough of test and illustration.

Let it be repeated then, that that article in the Constitution was not designed to exempt any person or persons of any sect, on the score of conscience as to matters of religion, from the operation and obligatory force of the general laws of the State authorized by other portions of the same instrument, and designed to serve the purposes contemplated by such other portions; it was not designed to exempt any persons from the

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same subjection that others are under to the laws and their administration, on the score that such subjection at times would interfere with the performance of religious rites, and the observance of religious ordinances, which they would deem it their duty to perform and observe but for such subjection. While all stand on equal footing under the laws, both as to benefits and privileges proffered, and as to exactions made, and liabilities, and penalties imposed, no one's rights of conscience, as contemplated by said Art. III, are violated in a *legal* sense. And it is fitting here to remark, that this court have to deal with the subject as *jurists*, regarding the Constitution and the laws, and what is done under them, with reference to principles and reasons that appertain to the subject in its legal elements, qualities, and aspects, and not as religionists, not as sectaries, not as those who regard something besides the government as of ultimate supremacy in the affairs of men on earth, but as those who regard the government created by the Constitution, and the laws made under the authority and within the scope of the Constitution, as the ultimate sovereignty in this State, and as equally obligatory and effectual upon all. It is not our *official* duty to discuss, nor our official prerogative to pronounce upon, the policy or propriety of the provisions and requirements of the Constitution, or of the laws enacted conformably to the Constitution in view of their bearing upon the matter of personal religion and morals, or on the matter of religious, moral, and secular education ; but it is only our province to interpret and give application and effect to the Constitution and laws as they exist. The court does not make the law, either constitutional or statutory, but only administers it in cases as they are presented for consideration and decision. The part of the opinion in *Donahue v. Richards*, 38 Me. 379, and the cases cited, which bear on this ground of the present case, are worthy of attention by all who may be interested in the subject.

Pursuing no further the discussion of this ground and aspect of the case, it is proper here to remark, that the note of the priest to the committee did not state any ground for asking for the exemption from attending school on the particular day in question, nor was the application limited to that day, nor did it name that day at all ; but it was an application for a dispensation, as matter of *favor* on the part of the committee, from attendance "on all holydays," with nothing indicating a *claim of right* made upon the committee ; and so, no cause, reasonable or otherwise, was presented, in view of which the committee could be put in a position of official fault by not giving leave of absence on that day. Then, as to the *condition*, on which only they would let the absenting scholars return to their schools. In that they asserted their right to

enforce the rule of exclusion for the residue of the term. So far as rights of conscience under the Constitution are involved, they were not precluded of that right, that is, the Art. III does not render invalid the law under which the committee claim authority to make and enforce that rule, nor the rule itself, as we have already shown.

It remains now to be considered whether the bill can be maintained on the other ground, namely, the prerogative of parents to control their children as scholars, as against the prerogative of the committee to make and enforce the rule in question. This does not involve any right or question of conscience under the Constitution, but only the matter of *legal* right under the statutes as to public schools. In this case it is not a question of discipline or punishment of the scholar, as it was in *Lander v. Seaver*, 32 Vt. 144, or as it was involved in the case of *Morrow v. Wood*, Law Register (Iowa), Nov. 1874, p. 692. By our statutes the committee are charged with the duty of "adopting all requisite measures," etc., as before recited. The graded school in Brattleboro is organized and acts in pursuance of the statutes in that behalf. The committee are chosen and charged with their duties under the same statutes. They adopted rules for the regulation of the schools, and for the improvement of the scholars in learning. The rule in question is for the purpose of inducing and enforcing constancy in attendance. That such constancy is essential to such improvement, is not debatable. That such attendance is requisite as matter of regulation, in order to the necessary classification of the scholars in reference to age, capacity, studies, and proficiency, is not debatable. Those who attend constantly cannot be required to linger, in order that the inconstant may keep along with them; nor can such inconstant scholars keep equal pace with those who attend constantly. The rule, then, is such as is contemplated by the statute, so far as the *purpose* of it is concerned. That purpose is indispensable to the attainment of the object and end proposed by the statutes, both as to the individual scholar, and as to all others who may be affected by his attendance and absence. The answer states, as before recited, that the rule had been in operation for more than ten years. The children of the orators were subjected to its operation in the present instance. Was that unlawful?

If the orators had the right to control the attendance of their children as against that rule, then the committee had not the right to maintain and enforce such rule. We are not prepared to sanction a view of the subject that would subordinate the authority of the committee in the matter of the attendance of registered scholars, to the will of parents. On the other hand, we do not hesitate to hold and declare as matter of law, that

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in this respect, the citizen is in subordination to the lawful rules for the regulation of schools and the improvement of scholars in learning ; and this is for the same fundamental reason that he is in subordination to the statutes themselves, on that or any other subject ; and it is no more his right to defy or disregard those rules, than it is to defy and disregard any statute that affects him as a citizen in respect to schools, or any other subject involving the common weal, as it is to be provided for under the Constitution by the legislation of the State. The occasion does not require a repetition of the trite maxims as to the surrender of natural rights as a condition of citizenship under the government, and is answered by the remark, that if the citizen, either on the score of conscience or of parental prerogative, or in any other respect, finds himself unduly curbed and restricted in what he regards his personal rights, natural or otherwise, by the Constitution and the constitutional laws of the State, there is available to him the beneficent declaration of Article XIX.

It suffices to recur to some of the leading cases that have been before the courts, some of them involving the prerogative of teachers and committees immediately over scholars where parents have not interposed ; some of them involving that prerogative in respect to scholars where, as in this case, parents have interposed. Of the former kind is *Guernsey v. Pitkin*, 32 Vt. 224, where, by the concurrence of committee and teacher, the plaintiff was virtually excluded from the school, because he would not comply with the requirement upon all scholars in grammar, to write compositions. In that case there was no prescribed penalty constituting a part of the rule of requirement, but the penalty was extemporized to meet the exigency. The prerogative of the committee and teacher, both as to requirement and penalty, was maintained. In *Landers v. Seaver*, 32 Vt. 114, the plaintiff, a boy some eleven years old, some hour and a half after the school had closed for the day, and when he was at home, and engaged in his father's service, used saucy and disrespectful language to the teacher, the defendant, in the presence of some of his fellow-pupils. For this the defendant whipped him on his going to school the next morning. The court held the following language : " But where the offense has a direct tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with the design to insult him, we think he has a right to punish the scholar if he comes again to school." Such was the judgment of the court in full bench, upon full argument and careful consideration, and no doubt is now entertained by this court of its soundness and propriety.

In that case there was no prescribed rule, either as to conduct or

penalty. But it involved directly the prerogative of the teacher as against the exclusive authority of the parent over his child, in reference to that child's conduct as affecting the school of which he was a scholar.

In *Sherman v. Charleston*, 8 Cush. 160, the plaintiff was expelled from school on account of licentious and immoral character, though not manifested by any acts within the school. The action was founded on a statute of Massachusetts entitling a party to recover damage for being unlawfully excluded from public school instruction. In that case there was no prescribed rule on the subject, either of requirement or penalty. CH. J. SHAW, in the course of an opinion which would be instructive and salutary to all to read and ponder, says: "It seems to be admitted, if not it could hardly be questioned, that for misconduct in school, for disobedience to its reasonable regulations, a pupil may be excluded. Why so? There is no express provision in the law (as it then was) authorizing such exclusion; it results by necessary implication from the provisions of law requiring good discipline. It proves that *the right to attend is not absolute, but one to be enjoyed by all on reasonable conditions.*" Again: "But the court are of opinion * * * * that a power is vested in the general school committee, or the master with their approbation and direction, to exclude a pupil * * * * for good and sufficient cause." *Stephenson v. Hall*, 14 Barb. 222, was an action against the defendants for expelling, as trustees, the daughter of the plaintiff from a public school. She had been excluded by the teacher for alleged misconduct, with the concurrence of the defendants. On appeal to the superintendent, she was to be permitted to return to the school on certain conditions of promise as to future conduct, with a confession that she had done wrong. She refused to comply with the conditions. ALLEN, J., in the course of the opinion, says: "It is undoubtedly true that trustees have the power, and it is their duty, to dismiss or exclude a pupil from their school, when in their judgment it is necessary for the good order and proper government of the school so to do."

We have carefully studied the Iowa case of *Morrow v. Wood*, before cited, and not only find nothing in conflict with the other cases decided, but that the ideas expressed by Judge COLE are in harmony with the other cases. In that case the teacher required a boy to study geography. His father, for good reasons, wanted him to devote himself to other studies requiring all his time and strength, without geography. The boy, in obedience to his father's direction, refused to study geography, and the teacher whipped him. Hence the suit. It appears that geography was one of the studies required by law to be taught; but there was no law requiring any scholar, or particular description of scholars, to study

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it. There was no rule of the school besides the arbitrary requirement of the teacher, which would make it the duty of the boy to pursue that study. Judge COLE says: "The statute gives the school board power to make all needful rules and regulations for the organization, gradation, and government of the school, and power to suspend any pupil from the privileges of the school for non-compliance with the rules established by them, or by the teacher with their consent." It does not appear, nor is it inferable, that the school board had made a rule requiring the boy to study geography, or had given their consent to the requirement of the teacher. The question then was, whether the teacher had justifiable cause for whipping the boy. The court held that she had not, and in the discussion, held that on the facts in the case, the father had the right to direct as to the study of geography by his son. We see no occasion for differing with that court in that case. In the course of the opinion it is said: "It is not proposed to throw any obstacle in the way of the performance of their duties" by the school board. Again: "We do not propose to lay down any rule which will interfere with any reasonable regulation adopted for the management and government of the public schools, or which will operate against their efficiency and usefulness. Certain studies are required to be taught in the public schools by statute. The rights of one pupil must be so exercised, undoubtedly, as not to prejudice the equal rights of others. But the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils. In the present case the parent did not insist that his child should take any study outside of the prescribed course;" "and how it can result disastrously to the proper discipline, efficiency, and well being of the common schools, to concede the paramount right to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand." And this, as well as all that was said by the judge, is to be taken as in a case where there was no rule as to the study of geography by the boy, except the personal arbitrary command upon him of the teacher. How this court would decide in a case involving the question of superiority of authority between the parent and the school board, as to the pursuit of a study required by the established rule of that board, we have now no occasion to announce or intimate. Nor had that court any such question before it.

In this connection it is interesting to refer to the case of *Spiller v. Woburn*, 12 Allen, 127, in which a girl, by direction of her father, refused to bow her head during prayer at the opening of the school, and

where the father refused to request that she might not be required to the rule on that subject providing that scholars would not be required to, whose parents should request that they might not be so required. Ch. J. BIGELOW delivered the opinion of the court, which held that it was lawful for the committee to expel her from the school for such disobedience to the rule. And further, in the same connection, the case of *Spear v. Cummings*, 23 Pick. 224, is worthy of attention, in which Ch. J. SHAW says: "The law provides that every town shall choose a school committee, who shall have the general charge and superintendence of all the public schools in such towns;" that "this includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as for instance, if infected with any contagious disease, or if the pupil or parents shall refuse to comply with regulations necessary to the discipline and good management of the school." These cases show the judicial views that have been held on the subject under consideration, and suffice for the present.

Recurring now to what is stated in the answer as to the manner in which the rule has been administered, it is proper to remark, that the lawfulness and propriety of the rule are not to be tested or adjudged upon the presumption that the penal part of it will be unjustly or unwarrantably enforced. The presumption is the other way, to wit, that it will be administered justly, and upon, and with reference to, warrantable occasion. If a case should arise in which it should appear that the penalty had been inflicted outside of or beyond the fair scope and reason of the rule, it would be both the province and the duty of the courts to accord proper remedy. But as before demonstrated, this is not such a case. And this leads to the further remark, that the remedy is not sought in this case as against the refusal of leave to be absent on the 4th of June; but as against the imposing, as the condition of remitting the penalty, a promise that absence for a similar cause should not be repeated that term. Such promise being refused, the penalty of exclusion was not remitted, and the children did not return to the schools; and hence the position assumed by the orators — the same as already stated — that the committee had not the lawful right to exclude scholars who should be absent by the direction of their parents, contrary to the established rule of the school.

As before intimated, this position takes no account of any difference of occasion or reason for such direction of parents, whether it be religious service or secular employment or amusement, but is on the ground only of the right of the parent as against the rule of the school. In

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reference to that position, in explicit statement, as the result of the discussion, it is held that scholars of a school are amenable to the school authorities as to their conduct as scholars affecting the school, notwithstanding the prerogative of their parents in respect to them.

This, however, does not imply that committees or teachers are the ultimate judges whether their measures, either by prescribed rule or extemporized expedient or impulsive act, are lawfully requisite or proper in a given case. The statute, in imposing the duty of adopting all requisite measures, etc., does not confer ultimate jurisdiction on committees, of the question whether a particular measure is requisite or not, within the sense and intent of the statute. When such question of lawfulness under the statute is made between a party against whom the measure operates, and the committee or teacher, that question is open before the courts for consideration and decision, in view of all that appertains to the subject of it. The rule in question in this case, and the enforcement of it, are subject to the judgment of the courts as between the parties to the suit. It is easy to suppose cases in which such enforcement would be beyond the lawful right of the committee. The rule itself, in terms and intent, contemplates exclusions as a penalty only where permission to be absent is withheld for want of reasonable cause shown. In case of casual sickness of the scholar; of sickness or death in the family of the scholar; of some impediment, like fire or flood; in case of various incidents of current life, giving occasion for temporary absence, the enforcement of the penalty of exclusion would, under such circumstances, be adjudged to be unauthorized under the statutes and law by which the subject is governed.

It is not intended by this to be held that there may not be causes in which the decision and action of the committee or teacher would not be deemed judicial and final. That subject has been involved in many of the decided cases, under peculiar statutes, especially in Maine and Massachusetts. We have no occasion to pronounce upon it further in this case.

Upon the facts shown, we are unable to find any warrant of law for maintaining the bill. The decree dismissing it is affirmed.

All the judges concurred.

HANNUM V. RICHARDSON.

(48 Vt. 508.)

Negotiable instrument — indorsement without recourse — effect of.

An indorsement without recourse implies a warranty that the note indorsed is valid.

ACTION of assumpsit for breach of warranty of a promissory note. Plea, the general issue. The note was made by one Lincoln, payable to the order of McIntosh & Co., and indorsed by the payees to defendant, who indorsed it to the plaintiff "without recourse." The opinion states the other facts.

The court submitted to the jury to find whether defendant warranted the note valid. Verdict for plaintiff. Defendant filed a motion in arrest of judgment, which was overruled, and he excepted. He also filed a motion to set aside the verdict as against evidence, which was overruled after hearing, to which he excepted.

Walker & Goddard, for plaintiff.

J. F. Deane and *M. P. Sawyer*, for defendant.

PIERPOINT, C. J. It may be observed in the outset, that this action is not brought by the plaintiff as the indorsee of the note referred to against the defendant as the indorser, and the action is not based upon the indorsement, but is brought upon an alleged warranty by the defendant that the note was a valid and binding note, based upon a valid and lawful consideration, when in fact it was given for an illegal consideration, and was at its inception void. On trial the plaintiff introduced evidence in support of his declaration. After the evidence was in, the defendant insisted that as it appeared from the note that it was indorsed by the defendant "without recourse," the legal effect of the indorsement could not be varied or controlled by evidence outside of the indorsement itself — that the same was conclusive in that respect; but the court held that such indorsement was not of itself conclusive of its legal effect in such sense as to exclude the evidence *aliunde*; and submitted the case to the jury in accordance with such ruling, and it is upon this decision and the charge of the court in respect to it, that the only question that has been raised and discussed by the defendant's counsel arises.

What would have been the effect of this objection if the action had been based upon the indorsement, it is not necessary now to inquire. By

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indorsing the note "without recourse," the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability, it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. The implied warranty is, in this respect, like an express warranty, the *scienter* need not be alleged or proved. Edwards, in his work on Bills and Promissory Notes, 188, says: "One who transfers a negotiable instrument by delivery or by indorsement, impliedly guarantees that it is genuine, and that he has title to it. The rule is the same in regard to personal property. The vendor of a chattel always gives an implied warranty of the title. 15 Johns. 240; 6 Cow. 484; 4 Duer (N. Y.), 191; 6 Johns. 5. Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is nevertheless responsible if the note proves to be a forgery." Edwards, 289.

In this case the note in question was given for intoxicating liquor sold in this State in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it imported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his \$50. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand.

The plaintiff has declared as upon an express warranty. If he could prove one, very well; if he could not, the implied warranty is just as available to him, the declaration being according to its legal effect.

This view of the case relieves it from all embarrassment growing out of the question as to the admissibility of parol testimony to vary the indorsement, as the effect of the indorsement is really not involved in the case. And the ruling and charge of the court were really more favorable to the defendant than he had the right to ask.

The exceptions to the overruling of the motion in arrest were waived. The exceptions to the refusal to set aside the verdict as against the evidence, this court refuses to hear, the decision of the County Court being conclusive in such cases.

Judgment affirmed.

CASES
IN THE
S U P R E M E C O U R T
OF
ARKANSAS.

JOHNSON V. STATE.

(29 Ark. 31.)

Criminal law — new trial — twice in jeopardy.

A person, indicted for murder in the first degree, was convicted of murder in the second degree, and obtained a new trial. *Held*, (1) that on the second trial he could not be tried for or convicted of a higher crime than murder in the second degree, and (2) that a statute providing that "the granting of a new trial places the parties in the same position as if no trial had been had," could not constitutionally be construed to authorize a conviction of murder in the first degree on the second trial.*

INDICTMENT for murder. The opinion states the case.

D. J. Pershall, for appellant.

S. P. Hughes, Attorney-General, contra.

ENGLISH, C. J. Alexander Johnson, the appellant, was indicted for murder in the Clark Circuit Court. There was but one count in the indictment, charging him with murder in the first degree. He was tried on the plea of not guilty, and the jury returned a verdict of murder in the second degree, and fixed his punishment at imprisonment in the penitentiary for twenty-one years. He filed a motion for a new trial, on the ground that the officer in charge of the jury permitted them to separate, etc. The motion was sustained, and a new trial granted by the court. He was again tried at the next term, the jury found him guilty of murder in the first degree, a motion for a new trial was overruled, and he was sentenced to be hung on the 27th of March, 1874, but the sentence was suspended by the allowance of an appeal by one of the judges of this court.

1. Before appellant was put on his second trial, he filed a plea in bar

* See *State v. Belden* (33 Wis. 121), 14 Am. Rep. 748 and note; *State v. McCord* (2 Kans. 232), 12 id. 469 and note; *State v. Martin* (30 Wis. 216), 11 id. 567; *Bell v. State* (48 Ala. 684), 17 id. 40; *State v. Brannon* (55 Mo. 63), id. 643.

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of the whole indictment, averring the former trial on the indictment, the verdict of guilty of murder in the second degree, the granting of a new trial, and that he had once before been in jeopardy for the offense charged in the indictment, and praying to be discharged. The court, of its own motion, overruled this plea. It is very well settled that where a defendant is tried and convicted of a criminal offense, and a new trial is granted him on his own motion, he may be tried again for the same offense. It is true that, by a constitutional provision as well as by the common law, no man can be twice put in jeopardy of life or limb for the same offense; but, where the first jeopardy has resulted in his conviction, it is rather a merciful interposition of the court, than any invasion of his rights, to set aside the conviction upon his own application in order to afford him the opportunity of another trial. *Stewart v. The State*, 13 Ark. 747. Whether the appellant could be put on a second trial for murder in the first degree, after, by the first verdict, he had been impliedly acquitted of that grade of offense, we shall presently see. But that he could be tried again for murder in the second degree, of which he had been convicted, and a new trial granted at his own request, and for his own benefit, there is no doubt.

The bill of exceptions states that the court, of its own motion, overruled the plea. This is not the usual mode of disposing of a bad plea. It would have been more regular to dispose of it on demurrer. *Sanger v. State Bank*, 14 Ark. 412. But a technical irregularity in getting rid of a bad plea is no cause of reversal. If the court had merely disregarded the plea, and made no disposition of it whatever, the judgment would not be reversed and the cause remanded merely to get rid of a bad plea. *Brearly v. Peay*, 23 Ark. 172.

2. The appellant, before he was put on his second trial, and after the plea of once in jeopardy was overruled, filed the following plea of former acquittal:

"The defendant pleads that he has been acquitted of the offense of murder in the first degree, as alleged in the bill of indictment, by the judgment of the Clark Circuit Court, entered on the 30th day of October, 1873."

To this plea the State demurred, on the following grounds:

1. The plea does not show how, or in what manner, the defendant has been put in jeopardy of his life.
2. It does not set out the record of the former indictment.
3. It does not propose to verify the same by the record.
4. It is for other reasons insufficient in law.

The court sustained the demurrer.

This plea was a loose attempt to set up the implied acquittal of the appellant of the charge of murder in the first degree, by the verdict of guilty of murder in the second degree, rendered in the first trial of the cause. The plea, however, substantially follows the form prescribed by the Code, for the record entry of such pleas (Gantt's Dig., § 1851), and was aided by the record of all the previous steps which had been taken in the cause, which was before the court.

The defense attempted to be set up by the plea was a matter of record in the cause which the court was proceeding to try; and the court was cognizant of all its proceedings in the premises. *Atkins v. The State*, 16 Ark. 574. The court sustained the demurrer to the plea not, perhaps, because of its want of form, but for the reason that, in its judgment, the matter of defense intended to be interposed by the plea was no bar to the second trial for murder in the first degree, for the court afterward, in its charge to the jury, told them, in effect, that the appellant might be convicted of murder in the first degree, and refused to instruct them to the contrary at the instance of the appellant.

The record of the former implied acquittal of the appellant of murder in the first degree being before the court, in the very cause which it was trying a second time, it was the duty of the court to tell the jury that they could not find him guilty of that grade of offense, if such be the law, even if the appellant had not interposed a plea of former acquittal. *Atkins v. The State, supra*.

And this, for the first time, brings this question fairly before this court: Where a person indicted for murder in the first degree is convicted of murder in the second degree, and obtains a new trial, can he be tried a second time for the higher grade of offense?

There are two grades of murder under our statutes; murder in the first degree, which is defined, and punishable by death; and murder in the second degree, punishable by imprisonment in the penitentiary for not less than five and not more than twenty-one years. Gantt's Dig., §§ 1253, 1254, 1262, 1263. In all cases of murder, on conviction, the jury are required to find by their verdict whether the accused is guilty of murder in the first or second degree. *Id.*, § 1957. There are also two grades of manslaughter which are defined by the statutes: Voluntary, punishable by imprisonment in the penitentiary for not less than two, nor more than seven years, and involuntary, punishable by like imprisonment for a period not exceeding twelve months. *Id.*, §§ 1264-1278. Upon an indictment for an offense consisting of several degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense

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included in that charged in the indictment. *Id.*, § 1961. The appellant, being indicted for murder in the first degree, could have been convicted of any degree of homicide warranted by the evidence. *Id.*, § 1962.

By the verdict of the jury, rendered on the first trial, he was convicted of murder in the second degree, and impliedly acquitted of the higher grade of offense, murder in the first degree. If this verdict had not been set aside, on his motion, he certainly never could have been tried again for the higher offense. Did the granting of a new trial, at his request, subject him to be tried again for murder in the first degree, of which he had, in legal effect, been acquitted by the first verdict?

A clause in the ninth section of the bill of rights of the Constitution of 1868 declares that "no person, after having been once acquitted by a jury for the same offense, shall be again put in jeopardy of life or liberty."

This is equivalent to the 12th section of the bill of rights, of the Constitution of 1836, which declares: "That no person shall, for the same offense, be twice put in jeopardy of life or limb."

A similar provision exists in the Constitution of the United States, and in the constitutions of most of the States. But this rule, says Mr. Greenleaf, has a deeper foundation than mere positive enactment, it being, as Mr. Justice STORY remarked, imbedded in the very elements of the common law, and uniformly construed to present an insuperable barrier to a second prosecution, where there has been a verdict of acquittal or conviction, regularly had, upon a sufficient indictment. 3 Greenl. Ev., §§ 34, 35.

In *The State v. Norvell*, 2 Yerg. 24, the defendant was indicted for murder, and was found not guilty of murder, but guilty of manslaughter. This verdict, though no judgment was entered upon it, was held to be a bar to a second indictment for murder, the first indictment being good, and the judgment upon it improperly arrested.

In *Campbell v. The State*, 9 Yerg. 333, the indictment contained three counts for larceny. The jury found the defendant not guilty as charged in the first and third counts, but guilty as charged in the second count. He moved for a new trial, and the court set aside the whole verdict, and ordered him to be tried a second time on the whole indictment, and he was found guilty on the third count, and a motion in arrest of judgment was overruled. The Supreme Court reversed the judgment, and ordered the accused discharged, on the ground that the first verdict of acquittal on the third count was a bar to a second trial on the same count.

In *Slaughter v. The State*, 6 Humph. 412, the accused was indicted

for murder, and the jury found him not guilty of murder, but guilty of voluntary manslaughter. On his motion a new trial was granted, and it was held that he could not be put upon a second trial for murder, and that the court should have so instructed the jury.

In *Hurt v. The State*, 25 Miss. 378, the accused was indicted for murder, and the jury found him guilty of manslaughter in the third degree. A new trial was refused, and on error the judgment was reversed, and the prisoner discharged, on the grounds that a second indictment for manslaughter (the first being bad) was barred by limitation, and that the verdict of manslaughter on the first indictment was an acquittal of the charge of murder, and that he could not be tried again for that offense.

The court said: "A verdict of a jury finding a party, put upon his trial for murder, guilty of manslaughter in the third degree, must of necessity operate as an acquittal of every crime of a higher grade of which he might have been convicted under the indictment upon which the issue was made; otherwise, the party, after undergoing the sentence of manslaughter, might be put upon his trial for the charge of murder, which would then be only postponed, and not decided by the verdict of manslaughter. The jury, in such case, render two verdicts: one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. They must first determine his guilt or innocence upon the charge made by the indictment, before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder, as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime."

The court further said: "But it is said that such verdict only operates as an acquittal while it is permitted to stand as part of the action of the court below, and as it has been set aside by this court upon the prisoner's own application, the cause must be treated in all respects as if no trial had taken place. In support of this position, authorities have been cited holding that when the judgment upon the trial for murder is arrested, the party may be remanded and again indicted for the same offense. The authorities doubtless announce the law correctly, but they have no application to the question under consideration. The judgment is only arrested in any case where the verdict is against the party. He would certainly never move, neither would the court for a moment entertain such motion in arrest of judgment, when the verdict was in his favor. Here the verdict of the jury acquitted the party of the crime expressly charged in the indictment, and at the same time exempted him from the penalty of the law for its supposed commission. He could not move in

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arrest of the judgment on this part of the verdict, because the judgment corresponding, in contemplation of law, with the verdict in this respect must also have been one of acquittal of the charge of murder. Whether this judgment was in fact pronounced by the court, as ought to be the practice, or attached by mere operation of law to the verdict, it was bound to be in the party's favor, and it could not, therefore, be arrested or set aside on his motion."

In *Brennan et al. v. The People*, 15 Ill. 512, a number of persons were indicted for murder. Four of them were tried on the plea of not guilty, and the jury found three of them guilty of murder, and the fourth, *Ryan*, guilty of manslaughter only. The defendants moved for a new trial, which was granted. They were tried again and all of them found guilty of murder and the case was taken, by writ of error, to the Supreme Court of Illinois. After deciding other questions in the case, the court said :

"Was the prisoner *Ryan* properly put upon his trial a second time for the murder of Story? An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment, the jury may find the prisoner guilty of manslaughter. And such a finding amounts to an acquittal of the charge of murder. The finding of the inferior is necessarily a discharge of the superior offense. *Ryan* was regularly put upon his trial on the indictment, and was found guilty of manslaughter. In contemplation of law, the jury rendered two verdicts as to him — one acquitting him of the murder of Story, and the other convicting him of the manslaughter of Story. He was thus legally tried for the offense of murder and acquitted. It is perfectly clear that he could not again be put in jeopardy on the same charge, unless that acquittal was set aside at his instance. A verdict either of acquittal or conviction is a bar to a subsequent prosecution for the same offense, although no judgment has been entered upon it. *Mount v. The State*, 14 Ohio, 295; *The State v. Norvell*, 2 Yerg. 24; *Hurt v. The State*, 25 Miss. 378. It does not appear from the record that *Ryan* has ever waived the benefit of the verdict of acquittal. It is true that he united with the other prisoners in asking for a new trial, but the application as to him must be regarded as extending only to the charge upon which he was convicted. He had no occasion for another trial except as to the charge of manslaughter. Being legally acquitted of the charge of murder, he surely did not desire that to be again investigated. It is not to be presumed that he would voluntarily place himself in peril upon a charge on which he had already been tried and acquitted. Even if the court, upon his motion, could open the whole case, the record does not show that such a power was either invoked or exercised. The application for a

new trial did not necessarily relate to the charge upon which he was acquitted. It naturally referred to the charge on which he was convicted. Nor did the court, in terms, set aside the entire finding of the jury. It simply granted the prisoner a new trial. The order was no broader than the application. There were two distinct findings as to Ryan, and, therefore, there was not the least necessity for disturbing the one acquitting him of murder. The one might be set aside, and the other allowed to stand. The verdict was not an entire thing which should wholly stand or fall. This view gives full effect to the order of the court. There was still a charge upon which Ryan could again be tried. This view of the question is sustained by adjudicated cases," etc.

The court cited, with approval, *Campbell v. The State*, 9 Yerg. 383, and other cases, and reversed the judgment as to Ryan, and remanded the cause with directions that he be tried again for manslaughter, and affirmed the judgment as to the other three prisoners.

This case was approved and followed in *Barnett v. The People*, 54 Ill. 325.

In *Jones et al. v. The State*, 13 Texas, 168, the prisoners were indicted for murder in the first degree; they were tried on the plea of not guilty, and found guilty, by the jury, of murder in the second degree. A new trial was granted on their motion, and they were tried a second time and convicted of murder in the first degree. On appeal to the Supreme Court of Texas the judgment was reversed. Mr. Justice LIPSCOMB, who delivered the opinion of the court, after examining the authorities, said: "The result of our investigation is, that both on principle and the authority of adjudged cases, the appellants, after having been acquitted of murder in the first degree, and found guilty of murder in the second degree, could not be legally tried and convicted of murder in the first degree, and that the verdict so finding them cannot stand as the basis of a judgment and execution thereon."

In *The State v. Tweedy*, 11 Iowa, 351, the accused was indicted for murder in the second degree, and found guilty of manslaughter. The judgment was reversed on appeal, and the case remanded for trial again. On the second trial, the court refused to instruct the jury that he had once been acquitted of murder, and could only again be tried for manslaughter.

The case went again to the Supreme Court, and in a very able review of the authorities by Mr. Justice WRIGHT, it was held, that the verdict of manslaughter, on the first trial, was an acquittal of murder in the second degree, and that the prisoner could not again be put in jeopardy for that offense. The court said: "When the prisoner moved for a new

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trial, and appealed to this court, he sought to be relieved of a judgment against him for manslaughter. He had no complaint to make that the jury had not convicted him of the offense of murder. If, however, he might properly be subjected to a second trial for murder, then he is compelled to submit to a verdict which he may deem ever so erroneous, lest by disturbing it, when insisting on his legal rights, he may place himself again in jeopardy. When a jury has once returned a verdict of guilty as to the lower offense, the prisoner should not, in our opinion, be placed in a position of additional hazard by attempting to be relieved of the erroneous judgment. It is settled upon authority that if he obtains a new trial, he may be again tried for the offense of which he was convicted. It is a very different thing, however, when it is sought to try him for an offense of which he was not convicted, and which was not, necessarily, in the verdict of guilty."

In *The State v. Ross*, 29 Mo. 32, Ross was indicted by a single count for murder in the first degree, tried on the plea of not guilty, and verdict of guilty of murder in the second degree. On an appeal to the Supreme Court of Missouri, the judgment was reversed, and the cause remanded for a new trial. Ross filed a plea, setting up the former implied acquittal of murder in the first degree as a bar to any further prosecution for that grade of offense. A demurrer was sustained to the plea, and on a second appeal, the Supreme Court held, in a well-considered opinion, reviewing the authorities (SCOTT, J., dissenting), that the verdict of murder in the second degree was an acquittal of murder in the first degree, and that the accused could not be tried again for that grade of offense. See, also, *State v. Ball*, 27 Mo. 327 ; 1 Bishop's Cr. Law, § 676.

In *Jordan v. The State*, 22 Ga. 558, the prisoner was indicted for murder, and the jury found him guilty of manslaughter, and the court held that the verdict was an acquittal of murder, and that a new trial could not be granted so as to subject him to a second trial for murder.

In *State v. Lessing*, 16 Minn. 75, the indictment was for murder in the first degree, and contained a single count. On a plea of not guilty, the defendant was tried and convicted of murder in the second degree ; and the court held that the verdict was equivalent to an express acquittal of murder in the first degree, and a bar to any subsequent prosecution against him for that grade of offense.

In *Guenther v. The People*, 24 N. Y. 100, the indictment contained nine counts for embezzlement, and others for larceny, and the verdict was guilty of embezzlement, which was held to be equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution. The court said : " If the jury find the prisoner guilty on one count,

and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty on such counts." See, also, to the same effect, *Weinzorpflin v. The State*, 7 Blackf. 186.

So, in *Clem v. The State*, 42 Ind. 420; S. C., 13 Am. Rep. 369, held, that if, upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying any thing as to the higher grade, the finding is, by implication, an acquittal of the higher grade.

In *Morris v. The State*, 1 Blackf. 37, Mr. Justice HOLMAN incidentally assumed it to be a general rule, that he who desires a new trial, must receive it as to the whole case; and in the *U. S. v. Harding et al.*, 1 Wall. Jr. C. C. 147, Mr. Justice GREER cautioned the prisoners, who had been acquitted of the higher and convicted of the lower offense, that if they insisted on a new trial, he would grant it upon the whole indictment, and their lives might become, on a second trial, forfeit to the law; but whilst such expressions of these learned judges are entitled to respect, they have not been treated, in the cases which we have cited, as adjudications of the question we are considering.

Mr. Bishop says: "The waiving of a constitutional right, implied in the making of an application for a new trial, is not construed to extend beyond the precise thing concerning which the relief is sought. If, therefore, the verdict finds a prisoner guilty of part of the charge against him, and not guilty of another part, as, for example, guilty on one count of the indictment, and not guilty on another; or there being one count, guilty of manslaughter, and not guilty of murder; and a new trial is granted him — he cannot be convicted on the second trial, of the matter of which he was acquitted on the first." 1 Bishop's Cr. Law (4th ed.), § 849.

The State v. Martin, 30 Wis. 216; 11 Am. Rep. 567, is very similar in its main features to the one now before us. Martin was indicted for murder, tried upon the plea of not guilty, and found by the jury not guilty of murder, but guilty of manslaughter in the second degree. He moved the court to set aside the verdict, and grant him a new trial, on the ground that one of the jurors was not impartial. The motion was granted, and on the second trial the jury found him guilty of murder in the first degree, the court having instructed them that they might so find if the evidence warranted such a verdict. The case went before the Supreme Court of Wisconsin on questions of law, which arose on the trial, and among them the one now before us. The court said: "The doctrine is well settled in this State that courts have the power to grant a new trial after conviction, for a good cause, upon the application of

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the defendant, and that no principle of the Constitution or the common law which is essential to the protection of the rights of the individual is violated thereby. The general rule is that one trial and verdict protect the defendant against any subsequent accusation whether the verdict be for or against him, and whether the court is satisfied with the verdict or not. But a person already convicted may waive the constitutional protection against a second prosecution and ask for a new trial to relieve himself from the jeopardy he is already in. And when he does so, what ought to be considered the extent of his application? Is it to expose himself to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of the one of which he has been convicted? It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. It is not in accordance with the principles of human conduct for a person to ask a further trial of a charge of which he has already been found guiltless by the verdict of a jury. But he seeks deliverance from one of which he has been convicted, and hence he asks that he may again be put upon trial for this charge. In this case the defendant was expressly acquitted of the charge of murder upon the first trial, and convicted of a lower crime. He asked for and obtained a new trial. A new trial for what? Of the charge of which he had been convicted, or the one of which he had been acquitted? Is it reasonable to suppose that the defendant asked for another trial in order to determine whether he had committed the crime of murder, or was it merely to determine whether he was guilty of manslaughter in the second degree of which he stood convicted? The answer would seem to be plain upon principle that it was the latter charge alone that he asked to have retried and that his application for a new trial should be held to apply to this, and not to the other crime of which he was acquitted. And this is in accordance with the great weight of judicial opinion upon this subject."

The court held that the prisoner was illegally convicted for murder on the second trial. That, on the second trial, the inquiry of the jury should have been confined to the crime of which he had been convicted on the first trial.

It is our opinion, upon principle and the great current of adjudications, that the verdict of murder in the second degree, rendered by the jury on the first trial, was equivalent to an acquittal of the appellant of murder in the first degree and a bar to a second trial for that grade of offense.

There is a Code provision as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All

the testimony must be produced anew and the former verdict cannot be used or referred to in evidence or argument." Gantt's Dig., § 1972.

No doubt that the granting of a new trial upon the application of the accused, on an offense of which he is convicted, places him in the same position as if no trial had been had, but if the section of the Code above quoted meant to go further and provide that where the indictment charges several offenses or grades of offense, and on the first trial the accused is convicted of one offense or grade of offense, and acquitted of another, the granting of a new trial places him in the same position as to the offense or grade of offense of which he was acquitted as if no trial had been had, it is in conflict with the clause of the 9th section of the bill of rights of the Constitution of 1868, which declares that, "No person after having been once acquitted by a jury for the same offense shall be again put in jeopardy of life or liberty," and the section of the Code must be construed and administered by this paramount constitutional limitation.

There is a similar statute in Kansas, and in *The State v. McCord*, 8 Kan. 232 ; S. C., 12 Am. Rep. 469, the defendant was tried for murder and convicted of manslaughter, and upon his motion, a new trial was granted and the court again held that he was to be tried for murder, as if no former trial had been had. The court said that the granting of a new trial was a legislative privilege awarded the accused, and he must take it on such terms as the legislature had thought proper to prescribe. This case is reported in 1 Green. Criminal Law Reports, 406 ; and is disapproved in a note by the author as contrary to principle, etc.

There is also a similar statute in California, and in *The People v. Gilmore*, 4 Cal. 376,* it was construed and held not to affect the constitutional protection of the accused against a second trial for an offense of which he had been acquitted. The prisoner was indicted for murder, convicted of manslaughter and a new trial granted. The court held that, notwithstanding this statute, he could not again be put upon trial for murder.

The judgment must be reversed and the cause remanded with instructions to the court below to grant the appellant a new trial, and that he be tried as if indicted for murder in the second degree.

* Given in full in note to *State v. McCord*, 12 Am. Rep. 469.

Wilson v. Tebbetts.

WILSON v. TEBBETTS.

(29 Ark. 579.)

Surety — discharge of one surety by operation of law.

One of several sureties for a debt notified the creditor upon the maturity of the debt, to sue the principal debtors within thirty days, which he failed to do, whereby, by statute, the surety was discharged. *Held*, that his co-sureties who had given no notice remained liable.

ACTION against the sureties on a promissory note. The opinion states the case.

Clark & Williams, for appellant.

U. M. Rose, contra.

WALKER, J. Wilson loaned to Van Horn \$3,000, the money of his ward, Wallace, and took Van Horn's note for the payment, with Gregg, Tebbetts and nine others as sureties. The note was dated December 5 1857, due one year after. Soon after the note had been executed, at the instance of the sureties and to indemnify them from loss by reason of their suretyship, Van Horn conveyed by deed of trust real estate ample in value to pay the debt, to a trustee, with power to sell the property after twenty days' notice for cash, and to pay the debt, should Van Horn fail to pay the same when due. A short time after the note became due and without sale under the deed of trust, Gregg, one of the sureties, gave Wilson notice to sue within thirty days. Wilson failed to bring suit as required by statute. No steps were taken by the sureties to have the property sold under the deed of trust for some eight years. In the meantime, the buildings on the lots, which constituted the chief value of the property, were destroyed by fire. The property, when sold, brought \$300, which sum was credited on the note.

Wilson brought suit against Tebbetts, who pleaded the discharge of Gregg in bar. The case was submitted to the court sitting as a jury upon the above agreed state of facts.

The plaintiff asked the court to declare the law applicable to the state of case to be :

1. That a notice to sue given by one of the joint sureties to the note sued on, and the discharge of such surety by reason of a failure to comply with such notice, does not discharge the other sureties to the note.

2. That where sureties to a note or bond procure a mortgage or deed

of trust to be executed by the principal upon property ample in value to pay the debt, indemnifying such sureties against loss by reason of such suretyship they cannot, while such deed of trust remains in force, discharge themselves from their obligations as sureties by giving notice to the creditor to sue.

The court refused to declare such to be the law, and rendered judgment for the defendant, from which plaintiff appealed.

Prior to the statute (Gould's Dig. 157,) mere delay or neglect on the part of the creditor to sue would not discharge the surety from liability to pay, even though by such delay the principal debtor should become insolvent. The appropriate remedy of the surety was in equity, where he might, by paying the debt, or under strong equitable grounds, become so far subrogated to the rights of the creditor as to take his recourse against the principal for his own protection.

The statute, ch. 157, sec. 1, provides that "any person bound as security for another in any bond, bill or note for the payment of money, or the delivery of property, may at any time after such action has accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and the other party liable. Sec. 2. If such suit is not commenced within thirty days after service of notice, etc., such surety shall be exonerated from liability to the person notified."

The suit in this instance is at law, but whether at law or in equity, the rights of the sureties are equitable and are to be determined on equitable principles. *Hempstead v. Watkins*, 6 Ark. 317.

In all that regards the creditor, both the principal and the surety are primarily and equitably bound to fulfill the contract. But as between themselves, the whole duty of performance rests, in contemplation of equity, on the principal.

The office of the statute is to impose a duty on the creditor to come to the relief of the surety in case of apprehended danger of liability, by reason of the inability of the principal creditor to pay. It confers a privilege upon the surety to be thus released from his suretyship, and as a consequence of neglect of the creditor to sue, the loss of his remedy against such surety. We have repeatedly held that the surety who gives such notice is discharged from the payment of the debt, unless suit is brought within the time prescribed by the statute.

The question now to be considered is, does the discharge of one of the sureties who gives the required notice, also discharge those who have not given notice?

The counsel for Tebbetts contend that such is the effect of the dis

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charge of one surety who has given notice, upon the liabilities of the co-sureties who failed to do so, and to sustain them in this position, have cited several adjudicated cases. That most strongly in point, and which would seem most fully to sustain them, is the case of *Wright, Adm'r, v. Stockton*, 5 Leigh, 153.

Under a statute of Virginia, substantially like our own, three out of four sureties gave notice to the creditor to sue; suit was brought upon the bond and the three were discharged. Suit was then brought against the estate of Wright, the surety who had not given notice.

When considering the case thus presented, CARR, J., said: "In this case the creditor was required to sue by three of the sureties, and delayed to do so for an unreasonable time, in consequence of which delay the three sureties who joined in the requisition have been discharged by a judgment from all liability. It is contended that this does not discharge the defendant, because his intestate did not join in the requisition to sue. If we take the statute literally, it would seem to require that when there were more sureties than one, all shall join in the requisition, for the words are: 'Where any person or persons are the surety or sureties in a bond, etc., it shall be lawful for such surety or sureties to give notice, etc.' Yet this construction would in a great measure defeat the remedy, as it would put it out of the power of one, where there are many sureties, to prevent the notice by refusing to join.

"If we look at the reason and object of the law, it would seem that a notice to sue by a part of the sureties would be as effectual as one given by them all * * *. Again, we know that there is a principle of the common law attaching to all joint obligations, by which a discharge of one obligor is a discharge of all."

It is upon this construction of the statute and upon the announcement of a common-law principle with regard to joint obligations, which can have no application in this case, because we have a statute which makes all contracts joint and several, that the court in that case held a notice by one surety who gave notice, to be a discharge of all.

With due respect for the conclusions which the court seemed to have reached, we think that neither the intent of the legislature nor the language of the statute sustains the court in its decision. Certainly it would not be a fair construction of a statute such as ours, which says: "Any person bound as security, etc., may by notice require suit to be commenced, etc., and that if suit is not brought, such security shall be exonerated."

Thus we see the right is given to "any surety to give notice to sue," and if suit is not brought, it discharges the surety who gives it. By the first section the right to give such notice is given to any person bound as

surety, and it clearly gives the right to give notice to one or more who may feel themselves insecure by reason of the failing circumstances of the principal debtor, whilst the right to be discharged is clearly limited to such surety as has given the notice. Thus considering this decision and the course of reasoning upon which it was reached, we can give it no controlling influence in the consideration of the case before us.

The People v. Buster, 11 Cal. 215, has also been cited by counsel for defendant as sustaining their position; and although the question in that case arose upon the effect of notice by one upon the liabilities of others who failed to give notice, the grounds upon which the court held that the discharge of one surety upon notice was also a discharge for his co-sureties were, that the obligation was joint, not joint and several.

In the case of *Letcher, Adm'r, v. Yantis*, 8 Dana, 160, one surety sued another surety for the recovery of one-half of the sum which he as surety had been compelled to pay to the creditor. The intestate of the defendant had given notice to sue under the provisions of a statute much like our own. The surety who gave the notice was held to be discharged from contributing to the payment of money which the co-surety, who gave no notice, had paid. This case but accords with our former decisions as to the discharge of the party giving the notice, and so far from being an authority in support of the defense, is fully in support of our construction of the statute in this case. Chief Justice ROBINSON said: "If Letcher was exonerated from all liability to the obligee, we cannot perceive any reason for presuming that he was responsible to Yantis, who elected to remain bound for the debt;" and so we may with like propriety say, if Gregg is exonerated by reason of his notice to Wilson to sue, no good reason is perceived why Tebbetts, who had an equal right to give the notice that Gregg had, but failed to do so — elected to remain bound (for that is the legal effect of his act), should also be discharged.

We have examined with some care the other authorities referred to by counsel, and find that they have no such application to the question at issue as to require particular notice.

Giving to the numerous authorities cited their full force, and that they clearly show that a change in the terms of the contract without the consent of the obligors is a discharge to all of them, still it is equally clear that this change or alteration must be effected by the act of the obligee or creditor, and not by mere operation of law; as for instance, where one of several obligors is discharged in bankruptcy, or where under the statute the creditor is, after notice, required to present his claim for allowance against an estate within a given time and fails to do so; in these and all like cases the discharge is said to be by operation of law.

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Thus in the case of *McBroom et al. v. The Governor et al.*, 6 Port. 32, the facts were that McBroom executed a bond with security, to the State of Alabama, for the discharge of his official duties. McBroom died; administration was had upon his estate, and notice given to all persons who held claims against said estate to present them within a given time or they would be barred. The obligee failed to present the claim within the time prescribed by the statute. Suit was brought against the securities, and their defense was, that as the obligee had neglected to present the claim within the time prescribed by the statute, the right of action was barred by the statute of non-claim as to the principal, and because the creditor had by his neglect discharged the estate of the principal from liability, they, as sureties, were also discharged.

GOLTHWAIT, J., upon this state of case, said: "The general rule without doubt is, that the extinction of the liability of the principal debtor is also an extinction of the liability of the surety. But an exception obtains when the extinction is caused by operation of law. * * * In the case under consideration, no act is alleged to have been done by the creditor which has affected the subject-matter of the contract, or which has changed the situation of the parties; he is charged alone with having been passive, and with an omission by reason of which it is said this right is extinguished as to all the obligors. * * * If, in consequence of the delay of the creditor to pursue his remedy against the estate of the principal debtor, a loss has accrued, it is not perceived how this circumstance, of itself, should destroy the obligation of the surety any more than in any other case where loss is the consequence of delay of the creditor."

In *Routon's Adm'r v. Lacy*, 17 Mo. 399, the facts were that Todd as principal, and Hall and Lacy as sureties, executed their note to Routon. Hall, one of the sureties, died, and the administrator of his estate served notice on Routon, the creditor, requiring him to bring suit under a statute similar in its provisions to our own. Routon failed to sue, and died. Todd, the principal, also died, and his estate proved to be insolvent. Lacy, the surviving surety, who failed to give notice to sue, was sued upon the note and pleaded the discharge of his co-surety Hall, as a discharge of himself also.

In regard to which, SCOTT, J., who delivered the opinion of the court, said: "The only question in the case which is attended with any difficulty is whether one surety can avail himself of a notice given by his co-surety, or whether if the creditor, after a notice from one surety, neglects to sue as required by law, he will lose his recourse against all of the sureties where there are more than one. There may be cases where such a construction of the statute would be manifestly unjust. If the

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co-surety should be consulted, and not wishing to be sued, should refuse to join in the notice, he would scarcely be entitled to any benefit from it. On the other hand, to maintain that the failure of the principal to sue when required could not be taken advantage of so as to prevent his becoming liable for the entire debt, in cases where he had no notice, would operate to increase his responsibility and vary his undertaking without his knowledge or consent. * * * The surety must look after his principal. He knows that he is bound. He had a right to give the notice to sue; from his neglect to do so, the creditor may presume that he is content to remain bound. If the liability is not increased; if his contract is not affected to his prejudice by any act of the creditor, he has no cause to complain of the failure to bring suit. While the law will not permit the creditor to injure a surety by his conduct or neglect, yet his obligation will not be so relaxed as to make it more a snare than the guaranty for the payment of a debt.

As this question is for the first time brought before us for consideration, we have indulged in making unusually full extracts from the several decisions which have been cited by the counsel on both sides, as well as others to which we have had access, and the result has led to the conclusion that, under a fair and just construction of our statute, any one or more of the sureties bound in a bond, bill or note with their principal, may at any time after the debt becomes due, either jointly or severally, give to the obligee or creditor notice, as prescribed in the 1st sec. of ch. 157, Gould's Dig.; and that the discharge provided for in the 2d sec. of that chapter is only a release to the party or parties who give such notice, and that the court erred in refusing to give the first instruction asked by plaintiff.

[The remainder of the opinion is not of general importance.]

Judgment reversed.

APPERSON, appellant, v. MOORE.

(30 Ark. 56.)

Mortgage — on property not in esse — lien in equity.

Where a mortgage is executed on an unplanted crop, a lien attaches in equity, as soon as the subject of the mortgage comes into existence, and in a proceeding to foreclose will be enforced against the mortgagor and those holding under him with record notice.

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BILL in equity to enforce a lien.

Adams, for appellant.

John J. Horner, contra.

ENGLISH, C. J. The material facts of this case as stated by the judge were as follows: Wm. McLain, a tenant on the Higgins plantation in Phillips county, being indebted to Apperson & Co., merchants of Memphis, in about the sum of \$1,000 for money and supplies previously furnished, and desiring to secure to them that sum, and to procure from them further advances, on the 1st of March, 1872, executed a deed of trust, by which he conveyed to James D. Quigley, as trustee, two mules, one gray mare, six head of cattle, one wagon, farming implements, gear, etc., then on the Higgins place, worked and cultivated by him (McLain) together with all the entire crop of cotton as raised and produced, planted or to be planted upon the above-described plantation, being in Phillips county, about ten miles southwest from Helena, etc. To be void on condition that McLain should pay to Apperson & Co., on or before the 1st of December, 1872, his then indebtedness, and also for such future advances in money or supplies as they might make to him during the year, to enable him to raise a crop, etc. A power of sale was given to the trustee on default of payment, and it was provided in the deed that the crop of cotton, as fast as the same should be picked, ginned and pressed, should be shipped to Apperson & Co., as commission merchants, to be by them sold and the proceeds applied to the payment of the debt secured by the trust; and on any attempt of McLain to divert the cotton from such shipment, etc., the trustee was empowered to take possession of the cotton, etc., and dispose of the same as provided in the deed. The deed was acknowledged on the 27th, and filed for registration in the recorder's office of Phillips county, on the 29th of March, 1872, and duly recorded.

After the execution of the deed, Apperson & Co. made advances to McLain of money and supplies, under its provisions, and among the advances made was \$600 to Higgins for rent of the place, on which the crop was made, for 1872. McLain made a crop, and on the 12th of January, 1873, sold four bales of the cotton made on the Higgins place, of the crop of 1872, intended to be covered by the trust deed, to W. E. & L. C. Moore, of Helena, who purchased them on the market. The main object of the bill in this case, filed by Apperson & Co., was to enforce their lien upon the cotton or its proceeds, purchased by the Moores

of McLain. On the final hearing, the court below decided that the deed of trust was not a lien on the cotton raised by McLain on the Higgins place during the year 1872, because the crop was not *in esse* at the time of the execution of the deed, etc., and dismissed the bill for want of equity. Apperson & Co. appealed. The decree recites that the cotton was planted after the execution of the trust deed, and from its date, first of March, we suppose that to be true. It may be assumed, therefore, that the crop was not in existence when the deed was made. It was to be produced during the remainder of the year on the particular plantation described in the deed, which McLain occupied as a tenant.

Adams, for appellant.

John J. Horner, contra.

ENGLISH, C. J. [After stating the facts.] Had this been an action at law, by Apperson & Co., or by the trustee in the deed, for four bales of cotton, or their value, the decision of the court below would have been correct; the action could not have been maintained. Because that which has no actual or potential existence is not the subject of a grant, nor can a man sell or mortgage a thing which he does not own.

The cases cited by the counsel for the appellees sustain the elementary principle. Thus *Comstocks v. Scales*, 7 Wis. 159, was trover for grain mortgaged by a tenant about the time it was planted, and it was held that the mortgagee could not maintain the action, because the crop was not in being when the mortgage was executed. So where logs on hand, and others to be afterward cut or obtained were mortgaged, in actions for the logs the mortgages were held invalid as to the after-cut or acquired logs. *Singles v. Phelps*, 20 Wis. 398; *Mowry v. White*, 21 id. 421; *Cudworth v. Scott*, 41 N. H. 456, was trespass for taking hay, grain, etc. The mortgage under which the plaintiff claimed was executed after parts of the crops had been sown and were growing, and others were sown after its execution. *Held*, that plaintiff had no valid title to the hay, grain, etc., from the after-sown crops. In *Otis v. Sill*, 8 Barb. 102, the mortgage was upon scythes, iron, steel and coal owned by the mortgagors, and also "all scythes, iron, steel and coal which might be purchased in lieu of the aforesaid property. *Held*, in trespass, that the mortgage was invalid as to property subsequently acquired. This case was subsequently reviewed in *Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 286.

An apt illustration of the rule is furnished from the old books. Per

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kins (tit. Grants, § 65) says: "A man cannot grant or charge that which he hath not." And in *Grantham v. Hawley*, Hob. Rep. 286, it is said by the court that "a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for these he hath neither actually nor potentially." But Perkins says (tit. Grants, § 90) "that if a man grants unto me all the wool of his sheep for seven years, then the grant is good." By which is meant the wool of the sheep which the grantor at that time has, for the wool granted has a potential existence." *Otis v. Sill*, 8 Barb. 111-112. Such is, no doubt, the rule in courts of law, but it is otherwise in equity.

Judge STORY, in *Mitchell v. Winslow et al.*, 2 Story, 644, after reviewing the English and American cases, and quoting with approval from the opinion of the Vice-Chancellor, in *Langton v. Horton*, 1 Hare, 549, says: "It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." In *Langton v. Horton*, the mortgage security was the assignment on the ship *Foxhound*, then on her voyage to the South Seas, together with all and singular her masts, etc., "and all oil and head matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present passage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the money advanced, and that the complainants be entitled to the benefit of the security in preference to the judgment creditor, and the Vice Chancellor decreed accordingly.

The rule in effect, as declared by Judge STORY, has been followed in the following cases, and many others. *Pennock et al. v. Coe*, 23 How. (U. S.) 117; *Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 288; *Sillers et al. v. Lester et al.*, 48 Miss. 524. *Butt v. Ellett*, 19 Wall. 544, was a case very much like the one before us, and the Supreme Court of the United States held that, although an instrument which purports to mortgage a crop, the seed of which has not been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged has been sown, and the crop grown, a lien attaches, and will be enforced in equity against a subsequent pur-

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chaser with notice. The lien was enforced against the proceeds of the cotton. So in this case the equity rule must be applied. The lien of the appellants, under the trust deed, attached to the crop intended to be mortgaged when the crop came into existence, and was superior to the title of appellees, who purchased the four bales of cotton of McLain. The deed of trust was upon the public records of the county long before they purchased the cotton, and they were chargeable with notice.

The decree of the court below must be reversed, and a decree entered here against the appellee for \$227.98, the value placed upon the cotton by the court below, with interest from 12th January, 1878, and for costs.

CASES
IN THE
S U P R E M E C O U R T
OF
INDIANA.

ARNOLD v. STATE.

(52 Ind. 281.)

Criminal law — indictment — robbery of bank bills.

An indictment for robbery of bank bills alleged the value of the bills but not their denomination. Held bad.

I**NDICTMENT** for robbery of certain bank bills.

K. M. Hord, A. Blair, B. F. Love and W. Z. Conner, for appellant.

O. A. Buskirk, Attorney-General, and W. S. Ray, Prosecuting Attorney for State.

BUSKIRK, J. The appellant was convicted of robbery. The errors assigned are, that the court erred in overruling motions to quash the indictment and for a new trial.

The objection urged against the indictment is, that it does not contain a proper and sufficient description of the property alleged to have been taken. The charging part of the indictment is, "that one John Ripley Arnold, late of said county, on the 23d day of November, A. D. 1874, at said county and State aforesaid, did then and there unlawfully, forcibly and feloniously take from the person of one George F. Stark, by violence and by putting him in fear, one national bank note of the value of five dollars, one national bank note or bill of the value of ten dollars, and three United States treasury notes or bills, of the kind or character known as "greenbacks," and of the value of one dollar each, and all being of the aggregate value of eighteen dollars, and all being of the personal goods and chattels of George F. Stark."

Robbery is defined to be larceny committed by violence from the person of one put in fear. 2 Bish. Crim. Law (5th ed.), § 1156.

Hickey v. The State, 28 Ind. 21; *Bonsall v. The State*, 85 id. 460; *Bicknell's Cr. Pr.* 321, *et seq.* No more particularity in describing the property is required than in an indictment for larceny. *Terry v. The State*, 18 Ind. 70; *Brennon v. The State*, 25 id. 408. The particular objection urged to the indictment is, that it does not give the denomination of the bills alleged to have been taken.

In *Daily v. The State*, 10 Ind. 536, the property was described as "two United States gold coins of the denomination and value of ten dollars, ten United States gold coins of the denomination and value of five dollars, and ten United States gold coins of the denomination and value of two dollars and fifty cents each, — altogether of the aggregate value of eighty-five dollars," and it was held sufficient, upon the ground that the court and jury knew that a United States gold coin of the denomination and value of ten dollars is an eagle.

In *McKane v. The State*, 11 Ind. 195, the property was described as sixty dollars of the current gold coin of the United States of the value of sixty dollars, and it was held sufficient. This ruling is in conflict with the one last cited.

In *Terry v. The State*, *supra*, the indictment was held good which described the property as "one pocket-book of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin, of American coinage, of the value of five dollars." But in *Hickey v. The State*, *supra*, and *Brennon v. The State* *supra*, the denomination and value of the bills alleged to have been stolen are given, and it was held that the description was sufficient.

In *Terry v. The State*, *supra*, the motion to quash was properly overruled, because the pocket-book was correctly described. See *Engleman v. The State*, 2 Ind. 91; *Crawford v. The State*, id. 182. The precise point made here does not appear to have been squarely made and decided in this State, but it has been made and decided in other States.

In *The State v. Longbottoms*, 11 Humph. 89, the indictment for larceny charged the defendant with having stolen "ten dollars, good and lawful money of the State of Tennessee," and it was held that this was not a sufficient description of the thing stolen. Money should be described as so many pieces of current gold or silver coin, and the coin must be stated by its appropriate name.

In *The People v. Ball*, 14 Cal. 101, it was held that an indictment for larceny describing the money as "three thousand dollars, lawful money of the United States," was insufficient. It was said: "In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, accord

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ing to the facts. 'The species of coin must be specified.' Arch. Cr. Pl. 61; Whart Cr. Law, 132."

In *The People v. Jackson*, 8 Barb. 637, it was held that in an indictment for stealing bank notes, it is sufficient to describe them in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels; that the property stolen must be described with certainty to a common intent. By which is to be understood such certainty as will enable the jury to say whether the chattel proved to have been stolen is the same with that upon which the indictment is founded, and as will show judicially to the court that it could have been the subject of the offense charged.

In *Rhodus v. Commonwealth*, 2 Duv. 159, the indictment charged that the defendants took and carried away "one lot of treasury notes, called greenbacks, the issue of the treasury of the United States of America, and one lot of Kentucky bank notes, and fifteen dollars in gold coin," and it was held insufficient. The court say :

"On the subject of indictments our Criminal Code recognized and established the modern common law, rightly understood and rationally applied. It dispenses with form and requires substance only. And what is now substance at common law is substance under the Code — and, that is, every fact necessary to constitute the specific crime charged — alleged with only such precision as :

"1. To enable the court to see that, admitting the facts, it has jurisdiction, and that the imputed crime has been committed by the accused.

"2. To enable the accused to understand the precise charge, and, without surprise, to prepare for defense against the proof which may be admissible to sustain that specific charge ; and,

"3. To make the verdict and judgment certainly available as a bar to any subsequent prosecution for the same criminal act.

"According to this test, the indictment in this case seems to us insufficient to authorize conviction.

"'One lot of treasury notes,' without any specification of denomination, number, or value, is too indefinite for the identification of the thing taken, or of any part of it; and 'one lot of Kentucky bank notes,' without even a specification of the bank, is still more indefinite.

"Neither of these charges sufficiently notified the accused of the facts to be proved ; and a conviction on either of them might not be availably pleaded in bar of another more specific indictment for the same offense. A minute description of all the treasury and bank notes might be impossible, and, therefore, is not required. But a nearer approach to it than this indictment makes, may be presumed to have been easy, and

ought to be required. A specification of even one of the notes in each lot, so as to identify it, might be sufficient to answer the ends of the test just defined.

"Nor can 'fifteen dollars in gold coin,' without any specification of the number of pieces, or of the character or identity of the coin, or of any portion of it, be deemed sufficient for all the purposes of the law.

"As might be expected, there is some diversity on this subject in several of the State courts. But principle, analogy, and preponderating authority, incline decidedly in favor of our conclusion. As some confirmation of this, see Archbold's Notes, pp. 853-856."

In *Wilson v. The State*, 1 Port. 118, it was held that an indictment for stealing promissory notes should state the value and the amount of the notes alleged to have been stolen.

In *The State v. Williams*, 19 Ala. 15, it was held that an indictment for larceny of bank notes should state their number, denomination and value.

In *Salisbury v. The State*, 6 Conn. 101, the property was described as "thirteen bills against the Hartford bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this State;" and such description was held sufficient.

In *Hamblett v. The State*, 18 N. H. 884, it was held that an indictment for the larceny of bank notes should contain the number and value of the bills alleged to have been stolen.

In *Fredrick v. The State*, 3 W. Va. 695, the property was described as "four legal tender notes of the United States of America, each one thereof for the payment of and of the value of ten dollars, each current of the United States, and amounting to the sum of forty dollars; also one national currency note on the First National Bank of Newport, for the payment of and of the value of ten dollars, amounting in the aggregate to the sum of fifty dollars," and the description was held sufficient.

In *United States v. Barry*, 4 Cranch's C. C. 606, it was held that an indictment for the larceny of a bank note must state the amount as well as the value.

In *United States v. McDaniel*, 4 Cranch's C. C. 721, the property alleged to have been stolen was described as "a bank note of the Union Bank of Georgetown, to the amount of ten dollars, of the value of ten dollars," was sufficient, without the averment that it was "for the payment of money to the amount of ten dollars." See *Regina v. Bond*, 1 Denison's C. C. 519, for the proper description of gold coin.

We do not think it is necessary, in an indictment for the larceny or robbery of bank notes, to state the numbers upon the bills, but the num

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ber of the bills stolen, with their denomination and value, should be stated.

The indictment in the case in judgment should have been quashed for its failure to state the denominations (or the equivalent words, for the payment of a certain sum of money) of the bills alleged to have been taken.

The judgment is reversed ; and the clerk will immediately notify the sheriff of Shelby county.

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(52 Ind. 347.)

Name — Christian name — initial letters.

Defendant was charged with an assault on "George W. Shott ;" the proof was of an assault on "George Shott." *Held*, that as the law recognizes but one Christian name the "W." was surplusage, and there was no variance. (See note, p. 181.)

PROSECUTION for an assault and battery. The opinion states the case.

D. C. Justice, for appellant.

C. A. Buskirk, Attorney-General, for State.

WORDEN, J. The appellant was prosecuted before a justice of the peace upon an affidavit charging him with having perpetrated an assault and battery upon George W. Shott. The cause was tried before the justice by a jury, where the appellant was found guilty. He appealed to the Circuit Court, where the cause was again tried by a jury, the trial again resulting in a verdict of guilty. Judgment on the verdict, a motion for a new trial having been overruled.

No question is made here, except as to the sufficiency of the evidence to sustain the verdict. Upon an examination of the evidence, we think it fairly sustains the verdict. Two juries have arrived at the same conclusion upon the question of the appellant's guilt, and we can by no means say, from an examination of the evidence set out in the record, that a wrong result has been reached.

There is, however, one particular in which the appellant especially claims that the evidence was defective. The evidence did not show that the name of the person assaulted and beaten was George W. Shott, as

alleged, but George Shott. It is insisted by the appellant that, as the name was alleged to be George W. Shott, the proof should have corresponded with the allegation, and that the omission or failure to prove the initial letter "W" of the middle name was fatal.

We recognize the rule that where matters of description are alleged though unnecessarily, they must be proved. *Wertz v. The State*, 42 Ind. 161. But a majority of the court are of opinion that the rule has no application to such case. The law, in the opinion of a majority of the court, knows but one Christian name, and where one Christian name is stated, and also the initial letter of another Christian name, as in this case, the initial letter may be rejected as surplusage, and need not be proved. These views are sustained by the following authorities: *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102; *The People v. Cook*, 14 Barb. 259, 307; *Dilts v. Kinney*, 3 Green (N. J.), 130; *Thompson v. Lee*, 21 Ill. 242; *Erskine v. Davis*, 25 id. 251; *Bletch v. Johnson*, 40 id. 116; *Isaacs v. Wiley*, 12 Vt. 674; *Allen v. Taylor*, 26 id. 599; *Hart v. Lindsey*, 17 N. H. 235; *Keene v. Meade*, 8 Pet. 1; *State v. Martin*, 10 Mo. 391; *Edmundson v. The State*, 17 Ala. 179; *McKay v. Speak*, 8 Tex. 376; *The State v. Manning*, 14 id. 402, *The People v. Lockwood*, 6 Cal. 205; *Bratton v. Seymour*, 4 Watts, 329. We are aware that the cases of *Price v. The State*, 19 Ohio, 423, and *The State v. Hughes*, 1 Swan (Tenn.), 261, would seem to be at variance with the views above expressed, but we are satisfied that the decided weight of authority sustains the proposition stated.

If the law knows more than one Christian name, it would seem to follow necessarily that where a man bears more than one, they must all be stated in naming him; otherwise there would be a variance. Yet it would perhaps be safe to say that no respectable authority can be found holding it necessary, in naming a third person, as the person assaulted in this case, to state more than one Christian name. Again, if the law knows more than one Christian name, it would seem to follow that in naming a person who bears more than one, in such a pleading, the names should all be stated in full. The stating of one Christian name, if the law recognizes more, with initial letters for the residue, would seem to be no better than giving merely the initials of all the Christian names. If a person has but one Christian name, it will not do to state the initial letter of that merely, but the name must be stated in full. So, if he has more than one Christian name which the law recognizes, it would not do to state one of them merely and give the initials of the others.

On the other hand, if the law knows but one Christian name, and that

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as properly stated, the initial letter or letters, standing for other Christian names, of which the law takes no cognizance, if inserted, may be regarded as surplusage, and it will be sufficient to prove the Christian name as stated, with the surname.

The judgment below is affirmed, with costs.

PETTIT, J., dissenting. The charge is, that the assault and battery was committed on George W. Shott, but the proof is that it was committed (if at all) on George Shott. The question is, was the proof sufficient? I think it was not. The name of the injured party must be proved as alleged. 1 Greenl. Ev., §§ 65 and 67; *Rex v. Craven*, Russ. & Ry. 14; *Rex v. Deeley*, 1 Moody, 303; *Rex v. Owen*, id. 118; *The State v. Vittum*, 9 N. H. 519; *Price v. The State*, 19 Ohio, 423; *The State v. Hughes*, 1 Swan (Tenn.), 261; *McLaughlin v. The State*, 52 Ind. 279.

NOTE.—Lord COKE said, “a man may have divers names at divers times, but not divers Christian names;” and again “regularly it is requisite, that the purchaser be named by the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames.” Co. Litt. 3 a. This doctrine was extended unduly in 1 Lord Raymond, 562, where a woman was indicted by the name of *Elizabeth Newman alias Judeth Hancock*, for keeping a bawdy house, and the indictment was quashed “because a woman cannot have two Christian names.” It is and has been quite the custom for parents to cumber their offspring with double or even treble Christian names, and there is a popular notion that all these names, either in full or in initial, are essential to a legal *descriptio personis*. But such is far from being the fact. That the law knows but one Christian name, and that the omission of a middle name or initial is of no possible importance, has been long settled in this and most of the other States. *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardener*, 2 Cow. 463; *Van Voorhis v. Budd*, 39 Barb. 479; *Gotobed's case*, 6 City Hall Rec. 25; *Milk v. Christie*, 1 Hill, 192; *Edmonston v. The State*, 17 Ala. 179; *McKay v. Spick*, 1 Tex. 376; *State v. Martin*, 10 Miss 391.

In the first of these cases the plaintiff in an action of trespass *quare clausum fregit* declared by the name of William Robinson, and the deed under which he claimed title to the *locus in quo* was to William T. Robinson; the variance was held immaterial. In the second case, in entitling an order staying proceedings the initials “V. S.” were omitted from the name of the plaintiff, Cornelius V. S. Roosevelt, but the court held the order to be properly entitled. *Gotobed's case* was an indictment for forgery—the name forged and set forth in the indictment being “John Wardell”—and the jury were authorized to find that it was intended to forge the name of one John N. Wardell.

In *Van Voorhis v. Budd* a tax was assessed upon the roll to *Henry D. Van Voorhis*, while the name of the person intended was William H. Van Voorhis, although he was also known in his town as Henry Van Voorhis. Held, that the description was sufficient.

The Massachusetts courts, however, held that a double baptismal name, as James Edward, is, in fact, but one Christian name, and essential to a proper description of the person. Thus Thomas Hopkins Perkins was indicted as Thomas Perkins, and the indictment was quashed therefor. *Commonwealth v. Perkins*, 1 Pick. 388. So Charles Jones Hall was enrolled in the militia as Charles Hall, and it was held that he was not duly enrolled. *Commonwealth v. Hall*, 3 Pick. 262. So where property was in a

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complaint alleged to belong to Nathan S. Hoard, and the proof was that it belonged to Nathan Hoard, the court held the variance fatal. These decisions are not based on authority.

That "junior" or "senior" is no essential part of name, was held in *People v. Collins*, 7 Johns. 546; *Commonwealth v. Perkins*, *supra*; *Padgett v. Lawrence*, 10 Paige; *Fleet v. Youngs*, 11 Wend. 522; *Kinrade v. Howe*, 10 Mass. 203; *Hadley v. Shaw*, 30 Ill. 354.

Although the statutes (Laws 1847, chap. 464, as amended 1860, chap. 80) make provisions for changing names by an order of a county court, there appears to be nothing in the law to prohibit a man from taking another name if he so desires. "A name," said Chief Justice ABBOTT in *Doe v. Yates*, 5 Barn. & Ald. 544, "assumed by the voluntary act of a young man at his outset into life, adopted by all who know him and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually *his* name as if he had obtained an act of parliament to confer it upon him. And in *The Matter of Snook*, 2 Hill, 566, Chief Judge DALY, in an opinion filled with curious and valuable information, held that a man was at liberty to assume another name without the interposition of the court. The practice of having a name changed by or in pursuance of a statute is thought to have arisen from the difficulty of changing one's name where one is known, without the interposition of a power which people are accustomed to respect.

It is very obvious from the earlier books that surnames were, anciently, little regarded, the baptismal name being considered the chief index of identity. "Special heed," said Lord COKE, "is to be taken of the name of baptism," and Chief Justice POPHAM in *Britton v. Wrightman*, Poph. 56, speaking of grants, declared that "the law is not precise in the case of surnames, but for the Christian name this ought always to be perfect." In fact the origin of the term surname — *super nomen*, or name over or added (Trench, Study of Words), indicates the slight office it filled in the *descriptio personis*. But the surnames, from their great variety and from the constant repetition of Christian names, have become the most certain mark of identity.—REP.

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(52 Ind. 462.)

Larceny — by finder of lost property.

One who finds lost property and converts it to his own use without attempting to restore it to the owner is not guilty of larceny, if he does not know or have means of ascertaining who the owner is. (See note, p. 187.)

INDICTMENT for larceny. The opinion states the case.

A. Iglehart and J. E. Iglehart, for appellant.

C. A. Buskirk, Attorney-General, and *J. B. Rucker*, Prosecuting Attorney, for State.

BIDDLE, J. Indictment against the appellant, charging him with

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stealing a pair of shoes, of the property of Charles I. Moffett. Plea, not guilty; trial by jury; verdict, guilty, fine one dollar, imprisonment in the State's prison one year, disfranchisement one year. Motion for new trial overruled; appeal.

The insufficiency of the evidence to support the verdict, and errors of law in giving and refusing instructions to the jury, are the main points urged on behalf of the appellant. The property, description, value, venue, etc., seem to be sufficiently established, but it is most earnestly contended that the body of the crime, the larceny, has not been proved. Upon this point, Charles I. Moffett testified:

"My name is Charles I. Moffett. I live in Center township, Vanderburgh county, seven and a half miles from Evansville. On July 15th, 1876, I came to Evansville, and bought a pair of shoes from James S. Ricker, of the firm of H. & J. S. Ricker, Main street, Evansville, between Second and Third streets, for one dollar and fifty cents, and paid for them. They are the same shoes as those exhibited in court now. I know them by the mark put in them by George Newett, policeman. After buying the shoes, I left them at Ricker's for two or three hours. While they were there, I went out and took too much beer. I next saw the shoes next day, last Sunday, at police headquarters. I think I took the shoes from Ricker's to Kasson's saloon with me, but I can't swear it positively. I think I saw defendant at Kasson's saloon; can't swear positively; can't tell where I parted with the possession of the shoes; can't swear positively that I had the shoes at Kasson's saloon. It all occurred at Vanderburgh county, Indiana. I recognized the shoes, after they were left at police head-quarters, by the way the laces were tied."

Cross-examined. "The shoes, when bought, were taken out of a box with other shoes similar in it. I recognized the shoes afterward by the way Mr. Ricker tied the knot of the leather laces. These shoes exhibited in court could not have been the shoes, unless the manner of tying them had been imitated purposely. Two pairs were not likely to have been alike. I do not know what became of the shoes; was under the influence of beer."

Henry Ayres testified:

"Am chief of police in Evansville. I saw the defendant first last Saturday evening. One Muscowitz, second-hand dealer on Fourth street, came to me, and I went with him. The defendant was trying to sell him the shoes exhibited here in court, the shoes pointed out by Charles Moffett, for one dollar. Muscowitz offered him fifty cents. I arrested the defendant, and asked him where he bought the shoes. He said, at a store on Main street. I went with him, and he pointed out as the place

H. & J. S. Ricker's store. He said he bought them yesterday (Friday), then corrected himself and said Thursday. The wrapper was off, and the laces were not in the shoes then. They were left at Muscowitz's. I went up there after them, and they were brought down to Ricker's. Defendant was uncertain who he bought the shoes from, but afterward pointed out Ludwig, who denied selling them. Mr. Ricker said, as he had shoes of that kind in the store, he might have bought them there, and did not feel like prosecuting the defendant, he not having missed the shoes. I then hunted up defendant the second time. Moffett was not along. Defendant said he sold the shoes on Water street. He took me to Speer's, on Water street, and showed me his place. He sold them for one dollar. I took them; he paid back Speer ninety cents, all the change he had. I locked him up. When I first saw the shoes, the strings were not tied as they are now. Defendant told me promptly where the shoes were, and claimed them as his shoes. He was at first uncertain who he bought them of, but afterward pointed out Ludwig. He claimed the goods as his own and took me to Speer's."

Charles Ludwig testified :

"I am clerk for H. & J. S. Ricker. Saw defendant there; Ayres brought him there. Defendant said he bought the shoes of me. I did not remember it. I did not sell them to him. I never saw him before Ayres brought him there. I saw J. S. Ricker sell the shoes exhibited in court, to Moffett. These are the identical shoes. Moffett put some mark in the shoes; I saw him do it. Moffett came back to Ricker's store, two or three hours after he bought the shoes, and took the shoes away with him; I handed them to him. He was intoxicated when he came back and took the shoes."

Cross-examined. "There were other shoes in same box, similar to these shoes. When Ricker sold them, I stood about twelve feet off. I saw Moffett mark the shoes, when he bought them. I recognize them in that way. I can't swear positively about that. Shoes worth one dollar and seventy-five cents."

B. Speer testified :

"On Water street, Saturday last, at my store, I bought shoes (here in court) from defendant, at one dollar. He told me that the police had arrested him, but said they had told him to go, he might sell them if he wanted to."

Cross-examined. "I tied the laces in the shoes, as they are now. Defendant was open about the matter; the shoes were wrapped in a paper."

Here the State rested, and the defendant produced George Newett, a competent witness, who testified :

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"I put the letter M in the shoes, this morning, in pencil. I think I only put three M's in them." Here witness was shown the shoes, and identified the M's he put in. "There are four in them, as shown to me now. Moffett has had the shoes since I marked them."

This was all the evidence given in the case, except some statements made by Moffett, called out by the appellant, which were not substantially different from his testimony, and therefore need not be given in this opinion.

After the introduction of the evidence and the close of the argument, the appellant asked the court to instruct the jury as follows :

1. "If the jury believe from the evidence that Charles I. Moffett, while under the influence of liquor, or otherwise, lost the shoes mentioned in the indictment, then you must acquit the defendant, even though you find that the defendant afterward had possession of them."

The court refused to give this instruction, as asked, but gave it in a modified form, as follows :

"If the jury believe from the evidence that Charles I. Moffett, while under the influence of liquor, or otherwise, lost the shoes mentioned in the indictment, then, under such circumstances that the finder could not identify the owner, you must acquit the defendant, even though you find that the defendant afterward had possession of them."

We think the court committed no error in refusing the above instruction as asked, nor in giving it as modified, for reasons which will subsequently more fully appear in this opinion.

The second instruction asked by the appellant was in the following words :

2. "If you find from the evidence that no one but said Moffett testified in regard to the taking of said shoes, and if you believe that said Moffett does not know and cannot explain how he parted with their possession, then you must acquit the defendant, even if it appears that he afterward had possession of them."

The court refused to give this instruction, "but read to the jury, in lieu thereof," from the opinion of this court, in the case of *Smathers v. The State*, 46 Ind. 447, our views upon a similar question, as expressed page 451. We need not enlarge this opinion by copying within it what we decided in that, to which we still adhere. In this view—and we think it covers the whole case—there was no error in refusing the second instruction, and none in reading from a former opinion of this court.

The record then informs us, that "the court further read to the jury the following, taken from Bicknell's Crim. Practice, p. 331 :

“A person may be guilty of larceny by taking and converting to his use lost goods found by him. If he knows the owner, it is clearly larceny; as where a carpenter finds money secreted in a bureau given him to repair, if he convert it to his own use, it will be larceny. So, if a hackman convert to his own use a parcel, left by a passenger in his coach by mistake, it is larceny if he knew the owner, or if he took him up or put him down at any particular place where he might have inquired for him. So, where there is a mark upon the property, by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion amounts to larceny. So, where a person bought at auction a bureau, and found in it a secret drawer containing money, which he used, it was held that would be larceny, unless he had reasonable grounds for believing that he bought the bureau and its contents. But where the finder does not know the owner, and has nothing to indicate where the owner may be found, his appropriation of the goods will not be larceny, even although he has not advertised the goods. And the mere fact that he had secreted the goods, or denied finding them, will not make it larceny.”

In our opinion, this instruction expresses the law, carefully and clearly stated; and it seems to us, in this case, that the court committed no error, either in giving or refusing instructions to the jury.

A more difficult question for us to decide is, does the evidence fairly sustain the verdict? We must adhere firmly to the principle of law, that the possession of property alleged to have been stolen is not a presumption of guilt against the possessor, unless a previous larceny of the property is established by proof; and the presumption of guilt will not arise until the larceny is proved by some proper evidence. In this case the evidence, aside from the conduct of the appellant, tends only very slightly to prove a larceny of the shoes. The condition of Moffett, the owner of the shoes, was such, at the time, that he might very easily have mislaid, forgotten, or lost them, without remembering any thing about them; and the same condition would make it very easy for any one to steal the shoes from him without his knowledge. But the conduct of the appellant, after he had obtained possession of the shoes, is open to very grave suspicions. His inability to readily account for how, when and where he obtained them, the transaction being so recent; his ultimate assertions that he bought them of Ludwig, which Ludwig denies; and his fixing the time of the purchase on Thursday, while they remained in the possession of the merchant until Saturday afterward, before they were sold to Moffett; the fact that the laces were taken out of the shoes, and the sale of them by appellant so soon afterward, much

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below their value, are all indices of guilt, and show a line of conduct in reference to the shoes altogether out of the ordinary course of men's affairs in the regular and honest transactions of life; yet all of this may be true, and the appellant innocent of the crime charged against him. If Moffett lost his shoes — a supposition not at all unlikely, considering his condition at the time — and the appellant merely found and took them, not knowing, and not having the means to find out, who owned the shoes, he cannot be guilty of larceny, however reprehensible his conduct might be afterward, in attempting to appropriate the shoes; and his conduct may be interpreted as nothing more than an attempt to fortify his claim to the shoes he had found, instead of stolen.

We are of the opinion that the conviction is not a safe one under the law.

The judgment is reversed; cause remanded, with instructions to grant the motion for a new trial, and for further proceedings.

Order for a return of the prisoner.

NOTE.—The rights, duties and liabilities of the finder of property not *derelict* at sea, nor hidden in the earth, are often of considerable consequence. Where goods are unclaimed by the owner, or are designedly abandoned by him, the finder acquires an absolute property in them at common law. 1 Blackst. Com. 296; 2 id. 402; 2 Kent's Com. (6th ed.) 356. But in many of the States there are statutes requiring the finder of lost property to advertise it; and, if no owner appears, it is to be sold under the direction of a proper officer and the proceeds divided between the finder and the municipality or State; or if the property found is less in value than a specified amount, and no owner appears in a specified time after advertisement the title vests in the finder. See Laws of Massachusetts, New Hampshire, Illinois, Iowa and Missouri.

By the Roman law the finder of lost property who should convert it to his own use, *animo lucrandi*, having no reason to believe it had been abandoned by the owner, was guilty of theft. Ulpian's Dig. 47, 2, 44; §§ 4, 10. And it is the statute law of some of the States at present that, "if any person come, by finding, to the possession of any personal property, of which he knows the owner, and unlawfully appropriate the same, or any part thereof, to his use, he is guilty of larceny and shall be punished accordingly." Iowa Laws, Rev. of 1860, p. 727. And this may be said to be the common law of New York, according to *The People v. McGarren*, 17 Wend. 460. But it seems that at common law it is necessary that the *animus furandi* should exist in order to render the subsequent concealment and appropriation larceny. *The People v. Anderson*, 14 Johns. 294; 1 Hill, 94; 1 Ry. & M. 160; *Butler's case*, 3 Inst. 107. In *The State v. Weston et al.*, 9 Conn. 527, the finders of a pocket-book in the highway, containing bank bills and having the name of the owner legibly written in it, were convicted of larceny upon proof that they could read and had converted the property to their own use. This case was approved in *The People v. McGarren*, 17 Wend. 460. See also 2 Russell on Crimes, 100, 103; manuscript cases of LAWRENCE, J., and GIBBS, J. But in *Porter v. The State*, Mart. & Yerg. 226, the Supreme Court of Tennessee held that if the finder of bank-notes convert them to his own use, with a full knowledge of the owner, there being no trespass at the time of the taking, it is not larceny. The court in this case maintained the doctrine that to constitute the crime of larceny there must be a trespass in the original taking of the goods, and cited 2 Leach's Crown Cases, 335; Chitty's Cr. Law, 918; 1 Hawkins' P. C., ch. 31, §§ 1, 2. From the decisions it is not exactly clear what the

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liability of the finder of property with knowledge of the owner is. But it is safe to infer that, in the absence of statutory provisions to render the act a felony, the *animus furandi* must be established in all cases as existing either at the time of the taking or of the concealment and appropriation. *Merry v. Ewen*, 7 M. & W. 623; *Regina v. Peters*, 1 C. & K. 245.

It is well settled that the finder of lost property is bound to take a reasonable degree of care in its preservation. Story on Bailments, 61; 1 Smith's Lead. Cas. (6th Am. ed.) 594; 2 Kent (6th ed.), 356. And for his necessary and reasonable expenses incurred on account of the property the finder is entitled to compensation. 2 Kent (6th ed.), 356; *Armory v. Flynn*, 10 Johns. 102; *Nicholson v. Chapman*, 2 H. Blackst. 254; *Etter v. Edwards*, 4 Watts (Penn.), 63; *Binstead v. Buck*, 2 Wm. Blackst. 1117. For this he has no lien on the property, and it can only be recovered by action of implied assumpsit against the owner. Cases *supra*. For all expense and labor voluntarily bestowed by the finder upon the article found it is doubtful if he may recover. *Armory v. Flynn*, *supra*; *Nicholson v. Chapman*, *supra*. But in *Reeder v. Anderson*, 4 Dana, 193, it was held that the finder was entitled to indemnity against expenditure of time and money in the successful recovery of lost property. Story thus lays down the law in regard to the care and attention which lost property is entitled to from a finder: "For although a finder may not be compellable to take goods which he finds, as it is a mere charity for the owner, yet when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods." Bailments, 65. What is *reasonable* care would be a question for the jury, and for the exercise of such care it is the true doctrine that the finder should receive compensation.

The right of the finder of lost property to retain it against all persons except the true owner has been recognized ever since *Armory v. Delamire*, 1 Strange, 504, where it was held that the finder of a jewel may maintain trover for the conversion thereof by a wrongdoer. 1 Smith's Lead. Cas. (6th Am. ed.) 584, 593. In that case a chimney-sweeper's boy, having found a jewel, carried it to a goldsmith to know what it was, and the goldsmith refused to return it, and it was held that the boy might maintain trover for the jewel, on the ground that, by finding, he had acquired such a property in it as would enable him to keep it against all but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. See *McAvoy v. Medina*, 11 Allen (Mass.), 548. The reason of the rule is thus stated in 1 Smith's Lead. Cas. 595: "Those on whom the possession of chattels personal is cast by the law, by the act of the parties or the force of circumstances, are charged with the duty of keeping and protecting that which is intrusted to their guardianship, and may consequently recover for any wrong by which it is impaired or injured, in the capacity of trustees, if in no other character." See, also, *McLaughlin v. Waite*, 9 Cow. 670; *Poole v. Symonds*, 1 N. H. 289; *Harker v. Dement*, 9 Gill. 7; *Elery v. Cunningham*, 1 Metc. 112; *Pinkham v. Gear*, 3 N. H. 484; *Mages v. Scott*, 9 Cush. 148; *Clark v. Maloney*, 3 Harr. 68; *Giles v. Grover*, 6 Bligh (N. S.), 277; *Neunham v. Stevenson*, 10 C. B. 13; *Bridges v. Hanksworth*, 7 Eng. L. and Eq. 424.

It has sometimes been made a question as to what is a losing or finding within the view of the law relative to this subject. In *Bridges v. Hawkesworth*, *supra*, the property was found in a shop upon the floor, where the owner had accidentally dropped it, and this was held a losing, and sufficient to entitle the holder to retain it against all but the owner. But in *McAvoy v. Medina*, 11 Allen (Mass.), 548, it was held that "a stranger in a shop, who first sees a pocket-book which has been accidentally left by another upon a table there, is not authorized to take and hold possession of it as against the shop-keeper." In *Lawrence v. State*, 1 Humph. (Tenn.) 228, it was likewise held that "to place a pocket-book upon a table, and to forget to take it away, is not to lose it, in the sense in which the authorities referred to speak of lost property." See *Wentworth v. Day*, 3 Metc. 354; *Symms v. Frazier*, 6 Mass. 345. In *Kincaid v. Eaton*, 98 Mass. 139, it was

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held, "that to discover an article voluntarily laid down by the owner within a banking-house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article. The occupants of the banking-house, and not the plaintiff (a customer's boy), were the proper depositaries of an article (a pocket-book) so left." This case also decides that such a finder is not entitled to an advertised reward. From the cases the general principle may be deduced that articles left by strangers or customers in a place of business are not lost in such a sense as to entitle any person whatsoever to take them, as a finder, but are presumed to be left in the charge of the keepers of the place of business. But where articles are accidentally dropped by a stranger or customer, in any public place, or by any one, in a public thoroughfare or street, they are lost in the legal sense, and the finder, if he chooses to undertake their custody, is bound to take reasonable care of them, and where the statute requires, to advertise them, can only appropriate them after a reasonable or statutory period has elapsed, or when he has reason to believe that they have been abandoned. The finder of such articles may hold them against all but the rightful owner; and when they are claimed by the owner he may not hold them to satisfy the lien of his necessary expenses thereon, but he must give them up and resort to his action for damages.—RKP.

HELWIG V. JORDAN.

(53 Ind. 21.)

Nuisance — on leased premises — when landlord liable for.

Defendant, being the owner of land on which was a kiln for drying lumber, leased the same, knowing that the kiln would be used by the lessee for drying lumber, and knowing, or having reason to know, that such use would be dangerous to plaintiff's adjoining property. *Held*, that defendant was liable to plaintiff for injuries occasioned to his adjoining property by the kiln.

ACTION for damages. The opinion states the case.

Harvey & Mattler and Porter, Harrison & Hines, for appellant.

Taylor, Rand & Taylor and Beck & Sullivan, for appellee.

BUSKIRK, J. The appellee sued the appellant for the recovery of damages occasioned by the burning of plaintiff's house by a fire communicated from a dry-house for drying lumber.

The material facts presented by the record are these: The appellee was the owner of a certain lot in the city of Indianapolis, upon which was erected a dwelling-house and other buildings; that the appellant was the owner of certain lots in said city, separated from the lot of the appellee by an alley fifteen feet in width; that the appellant and one Jackson and an Rider were partners in the business of manufacturing furniture, which was carried on on the lots of the appellant; that in May, 1869.

the appellant and his partners, for the purpose of seasoning and drying the lumber used in said business, erected on said lots a kiln for drying lumber, under which was a furnace for burning wood ; that in September, 1869, the said partnership was dissolved by the appellant's withdrawing therefrom, the business being carried on by the said Jackson and Rider ; that by the terms of said dissolution, the said Jackson and Rider became the owners of said drying-kiln ; that at the time of such dissolution the appellant leased the said premises to the said Jackson and Rider for the term of three years, reserving rent therefor ; that the interest of said appellant in the said kiln passed to the said Jackson and Rider, in pursuance of the terms of said dissolution, as other personal property, and not as real estate ; that the lease merely described the real estate, and then added, " together with the rights, privileges and appurtenances thereunto belonging, to have and to hold the same, for and during the term of three years," etc. ; that the said Jackson and Rider took possession of the said premises and continued to occupy the same and use the said kiln until in July, 1870, when the same took fire and was burned up, from which fire was communicated to the buildings of the appellee, by means whereof they were destroyed.

The mere structure itself was not a nuisance or dangerous to any person, but its use and operation as a kiln, at the place where it was situated, was necessarily dangerous to the property of the appellee. There was no agreement, covenant or guaranty on the part of the appellant that his lessees should have the right to continue the use of the said kiln, nor does it expressly appear that he was to receive any rent or profit from the continued use of said kiln ; but it does appear that he knew his lessees intended to continue the said business, and that such kiln was necessary to the successful operation thereof. He received rent for the entire premises, which included the kiln, and he is to be presumed to have known or to have reason to believe that his lessees would, under his lease, continue to use the same in the same manner in which it had been used and for the purpose for which it was constructed ; and it is to be further presumed that he knew the danger which would result to the property of the appellee by such use.

The question, and the only one, which we are required to decide is, whether, under the facts and circumstances stated, the appellant is liable for the injury inflicted upon the property of the appellee.

This case is reported in 1 Wilson's Superior Court Rep. 447. It was there held :

1. The common council cannot, by granting a building permit, thereby authorize the erection of a building to the injury of person or property.

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2. One who erects a nuisance is liable for its continuance, as for a new nuisance, as long as it continues, and it is not in his power to release himself therefrom by granting it over to another.

3. One who demises his property for the purpose of having it used in such a way as must prove offensive to others may himself be treated as the author of the mischief.

4. One who erects a nuisance and afterward parts with the real estate upon which it is located, either by conveyance with a warranty or covenant that amounts to an affirmance of the nuisance and a grant of its continuance, or leases it on terms by which he derives a benefit or profit from its continuance, or leases his real estate, receiving rent therefor and knowing, or having reason to believe, that the use of the property for the purpose for which it is leased will prove to be injurious to the property of others, or become a nuisance, will be liable to an action for an injury resulting therefrom.

The question involved was quite fully considered in the court below, where the leading cases were cited and reviewed. We think the conclusion reached by the court below was correct. We do not deem it necessary to enter into a review of the authorities, but content ourselves with citing them. *Roswell v. Prior*, 12 Mod. 685, also reported in 1 Lord Raym. 713, and 2 Salk. 460; *Rich v. Basterfield*, 4 C. B. 783; *Rex v. Pedly*, 1 Ad. & E. 822; *Fish v. Dodge*, 4 Den. 311; *Waggoner v. Jermaine*, 8 id. 306; *Blunt v. Aikin*, 15 Wend. 522; *Mayor, etc., of Albany v. Owniff*, 2 N. Y. 174; *Staple v. Spring*, 10 Mass. 74; *Hanse v. Cowing*, 1 Lans. 288.

The last case cited is clearly distinguishable from the case in judgment. There, the person who had erected the nuisance had conveyed the title without a warranty or covenant that amounted to an affirmance of the nuisance or a grant of its continuance, and parted with the possession before the injury complained of. Here, the appellant owned the real estate on which the kiln was erected. The kiln was erected by himself and his partners for partnership purposes. He sold his interest in the partnership to his partners, and leased the real estate on which the kiln was erected, and received rent therefor. The kiln, when used, was dangerous to the property of others. It is plainly inferable from the facts in the record that the appellant knew that the kiln would be used for drying lumber, and that such use would endanger the property of the appellee. He retained the title to the real estate and derived an income from the use thereof, including the kiln.

The judgment is affirmed, with costs.

PETTIT, J., was absent, and took no part in the decision of this cause.

LOVE V. MILLER.

(53 Ind. 294.)

Broker — commissions — when earned.

The owner of real estate agreed with a broker that if the latter would "find a purchaser or make a sale of said real estate" he would give said broker a certain sum as commission. The broker procured a person to enter into a legal and binding contract with the owner to purchase said real estate, but he afterward refused to perform. *Held*, that the broker was entitled to the sum agreed.*

ACTION for money. The opinion states the case.

J. T. Dye and *A. C. Harris*, for appellants.

C. W. Smith and *R. O. Hawkins*, for appellees.

BIDDLE, J. The appellants were real-estate brokers in the city of Indianapolis. The appellees were owners of certain real estate, situated in the city, on the corner of Washington and Mississippi streets. The parties mutually agreed that if the appellants would "find a purchaser, or make a sale of said real estate," they should receive for their commission \$1,000, which the appellees agreed to pay. In pursuance of this agreement, the appellants procured an offer for the real estate mentioned, from John Wymond, which was accepted by the appellees. The offer and acceptance are in the following words :

"To Messrs. Miller and Crawford,

"GENTS :—I will give you for your property on the corner of Washington and Mississippi streets, in the city of Indianapolis, Ind. : I will assume forty-five thousand dollars now on the property, after deducting the back interest, and give you my dwelling property, in which I now reside, at Lawrenceburgh, Ind., and pay you five thousand dollars in cash ; and I am to have the rent from December 1st, 1878.

"JOHN WYMOND.

"Indianapolis, Dec. 4th, 1878.

"We accept the above proposition.

"SCOTT MILLER.

"J. MONROE CRAWFORD."

* See *Tombs v. Alexander* (101 Mass. 255), 3 Am. Rep. 349 ; *McClave v. Paine* (49 N. Y. 531), 10 id. 431 ; *Walker v. Tivrell* (101 Mass. 257), 3 id. 352.

On the 8th of December, 1873, the parties met at the office of the appellants, to carry out the agreement by executing the proper conveyances interchangeably and paying and receiving the purchase-money. After some talk between and amongst the parties, Wymond became dissatisfied with the agreement as a bargain, and refused to execute his part of it; whereupon the appellants informed the appellees that they, the appellees, could hold Wymond to his agreement, and that they, the appellants, should hold them, the appellees, for their commission of \$1,000. These are the essential, and, we believe, the undisputed facts of the case. The appellees refused to pay the commission, and the appellants brought this suit. We do not state the issues nor the proceedings, as no question is made concerning them. The finding and judgment below were against the appellants. The main question there was, and here is, are the appellants entitled to recover their commission against the appellees, upon the facts stated? And the case, we think, turns upon the sole question whether the offer and acceptance, as set forth, amounts to "finding a purchaser, or making a sale" of the real estate described or not, within the meaning of the agreement made between the appellants and appellees.

The question involved in this case has never before been presented in this State, we believe. Indeed, we have very few reported cases, in any way touching the subject-matter of brokers' commissions. The authorities of other States do not seem to entirely agree; but upon close analysis, it does not appear that they are in serious conflict.

To complete a sale of personal property, either actual or potential delivery of the article sold is necessary, unless there is some different special stipulation in the agreement. In ancient times, it was necessary, in the sale of land or a tenement, to complete the right of possession by the delivery of a turf or clod, which ceremony was called *livery of seizin*; but, in the advancement of civilization and intelligence, when written deeds were introduced, this cumbrous and symbolical performance fell into disuse, and has long since been abolished. A bargain and sale, since the enactment of the statute of uses and trusts, "is a kind of a real contract, whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain trustee for, or seized to the use of, the bargainee; and then the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession." 2 Bl. Com. 338. Indeed, conveyance in trust is frequently nothing more than a contract that the trustee shall convey the land in some special manner, or to some particular person, or

as the *cestuy que use* may direct. According to this view, a contract to convey may be held as a sale. No question has been made in this case as to the validity of the contract between the vendors and vendee.

The following cases are cited on behalf of the appellees : *Mc Garock v. Woodlief*, 20 How. (U. S.) 221. In that case, the vendor gave his broker specific directions to sell his plantation and slaves for \$130,000, of which \$20,000 was to be paid in cash, and the remainder in five equal, annual installments, with interest. The broker found a purchaser, George M. Long, who agreed to these terms, but when they proceeded to execute the contract, Long and the broker changed the terms of it, by substituting Long's wife as the purchaser, and were to negotiate certain notes she held against Dr. Bard, to apply on the \$130,000, and made no special arrangement at all as to the payment of the \$20,000. To this new agreement, as far as the evidence showed, the vendor never consented. The case, in short, is this : The vendor directs his broker to sell his property according to specific terms ; the broker ultimately changes the terms to another contract, to which the vendor never agreed. Upon this ground, it was held, that the broker could not recover for his commission, and we think very properly. But it is quite a different case from the one before us. True, Mr. Justice NELSON, in delivering the opinion of the court, says : " Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale ; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions."

These words, however, must be held to have been spoken, not generally, but in reference to a purchase according to the terms specifically given to the broker by the vendor.

Richards v. Jackson, 31 Md. 250 ; S. C., 5 Am. Rep. 49. This case supports the appellees, in principle. There was a clause of forfeiture, however, in the contract, by which the purchaser could abandon it on payment of \$250. But the decision of the case was not put upon this ground.

Read v. Rann, 10 B. & C. 438. This case bears upon the point in question, but is not analogous to the case we are considering. The suit was brought upon a *quantum meruit* count, and the proof showed a special contract, unfulfilled ; and upon this ground, the broker failed to recover, PARKE, J., remarking :

" The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied."

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Kimberly v. Henderson, 29 Md. 512. In this case the brokers brought the vendor and the vendee together, and they executed certain papers, "whereby they respectively contracted for the sale and purchase of the property, with a stipulation that in case either party should fail to comply with the contract, a forfeiture of \$1,000 should be paid by the party in default, to the other." The vendee failed to comply with the contract, and paid the forfeiture. This contract could not be mutually enforced between the vendor and the vendee; and upon this ground it was held that the brokers could not recover for their commission. ALVEY, J., in delivering the opinion of the court, remarked:

"Here the undertaking failed. A party was produced, it is true, and a contract entered into through the agency of the appellees, but of such a character that the party contracting, by the exercise of an option given him, relieved himself of the obligation to complete the purchase, and did not, in fact, become the purchaser."

Besides, the brokers inserted a clause in the contract which was not communicated to their principal. True, in this case there is a *dictum* spoken by the judge, which would seem to support the view taken by the appellees, but that, we must suppose, was spoken of the contract before him, and not as a general principle, applicable to all contracts for a broker's commission; at least, being a mere *dictum*, it is not authoritative.

De Santos v. Taney, 18 La. Ann. 151. De Santos, a real estate broker, was employed by Taney to sell three houses. Avegno made an offer, through De Santos, to Taney, to buy the houses for \$15,500, which Taney accepted in writing. When the parties met, to have the papers signed by Avegno, he and Taney disputed about the payment of the taxes on the property, Avegno insisting that, by the agreement with the broker, he was to pay but two-twelfths of the taxes, while Taney insisted that his intention was to have the sum named for his property, without any deduction for taxes; upon this the parties disagreed, and the contract was not consummated. And the decision of the case was made to turn upon the point that the contract failed "on account of the broker's neglect to stipulate clearly concerning the taxes." This case, in its premises and conclusion, does not support the appellees; though BUCHANAN, J., said:

"But all the authorities confirm the doctrine of Judge MARTIN, as we understand it, that no brokerage is due until the sale is complete and executed, that is to say, until the consideration of the sale has passed to the vendor."

We are not convinced that all the authorities confirm this proposition

indeed, we have been unable to find one that carries the doctrine to such an extent. SPORFORD, J., in the same case, expresses an opposite opinion. He says :

“ I do not think it necessary that the consideration should have passed, but I consider brokerage earned so soon as the broker has effected a complete bargain between the parties.”

Here are two *dicta* from different judges, in the same case, quite opposite, while both agree as to the principle upon which the case is decided. This is a strong instance to warn us from following what a judge says, instead of what a court decides. The *dictum* of a judge is very different from the decision of a court, although the judge and the court may be the same person, and the *dictum* and decision in the same case. There is nothing authoritative in a case, except what is required to be decided to reach the final judgment, and what by the judgment becomes *res adjudicata* between the parties as to the subject-matter of the suit.

We have thus carefully examined all the authorities cited by the appellees, and considered the argument in support of their views, but we are unable to adopt the extreme rule contended for by them — approved but by the single case of *Richards v. Jackson, supra*, and expressed *obiter* by only one of the judges in the case of *De Santos v. Taney, supra* — namely, “ that no brokerage is due until the sale is complete and executed ; that is to say, until the consideration of the sale has passed to the vendor.” This rule is not supported, indeed we think it is quite overthrown, by the current of authorities ; nor does it seem to us to be applicable to the State of Indiana. In this State, lands are bought and sold almost as freely as commodities ; they are often mortgaged or pledged as a basis of business operations ; sales are made upon deferred payments, for the purpose of holding them as investments ; conveyances are frequently executed in trust, for the convenience of the parties ; large quantities of lands are held by executive contracts, to facilitate transfers by assignments ; in many of which cases the consideration is not paid, and not to be paid, and the titles conveyed in fee, for months and even years, after the sale is made, possession given and full enjoyment had. Under such circumstances, to adopt a rule which would deny the broker his commission until the consideration was paid and the final conveyance executed, would be manifestly unsuitable to our condition, and we think unjust. We are of opinion that when the broker has effected a bargain and sale, by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission, whether his employer chooses to comply with or enforce the contract or not. The following authorities support us in our conclusion : *Cook v. Fiske*, 12 Gray, 491 ; *Drury v.*

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Newman, 99 Mass. 256; *Middleton v. Findla*, 25 Cal. 76; *Knapp v. Wallace*, 41 N. Y. 477; *Stillman v. Mitchell*, 2 Rob. (N. Y.) 523; *Higgins v. Moore*, 84 N. Y. 417; *Heinrich v. Korn*, 4 Daly, 74; *Rice v. Mayo*, 107 Mass. 550; *Mooney v. Elder*, 56 N. Y. 238; *Barnard v. Monnot*, 8 Keyes, 203; *Chapin v. Bridges*, 116 Mass. 105.

The case of *Lane v. Albright*, 49 Ind. 275, is in harmony with the above authorities in principle, though not in point as to fact with the case we are considering. In that case, the agent was negotiating a sale, but was prevented from completing it, by the act of the vendor in making the sale himself; in this case, the brokers had completed the sale, but the vendors refused to enforce the contract. We can see no distinction between the cases in principle, as to the rights of the agent or the brokers. In the one case, as the failure to complete the contract was not the fault of the agent, we held that he was entitled to his compensation; in this case, as the failure to enforce the contract after its completion was not the fault of the brokers, we must hold that they are entitled to their commission.

The judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

SHELTON V. STATE, *ex rel.* BOARD OF COM'RS OF MORGAN CO.

(53 Ind. 331.)

County treasurer — liability of.

Action on behalf of a county against a county treasurer to recover moneys received by him as interest on public moneys deposited by him in a bank. *Held*, that the county treasurer was not a bailee of the public moneys but a debtor therefor, and that therefore he was not liable for such interest.*

ACTION for moneys. The opinion states the case.

O. F. McNutt, G. W. Grubbs, G. H. Chapman, U. J. Hammond and J. J. Hawes, for appellant.

W. R. Harrison and W. S. Shirley, for appellees.

DOWNEY, C. J. Action by and judgment for the appellees against the appellant. Two errors are properly assigned in this court. The first is

* Compare *Perley v. County of Muskegon*, 20 Am. Rep. 637

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the overruling of the demurrer of the defendant to the complaint, and the second, overruling the motion of the defendant for a new trial.

In the complaint, it is alleged, in substance, that on the 6th day of August, 1865, the defendant became and was the duly qualified treasurer of Morgan county, and continued to hold that office and to discharge the duties thereof, until the 6th day of August, 1871, during which time he had in his hands large sums of the public moneys of said county, being all the public moneys and funds of the county; that he deposited such funds in and with the First National Bank, in Martinsville, in said county, and received from said bank interest, profit and income for and upon the same, and for the use and deposit thereof, for and during the time aforesaid, \$2,141.97, a bill of particulars of which is filed, and which he converted to his own use; that the defendant ceased to be such treasurer on the said 6th day of August, 1871, his successor therein having been duly elected and installed; yet the defendant has failed and refused to pay to his successor, etc., said sum so received for interest and profits on said money of the county, except, etc., leaving balance due \$1,686, the amount paid being the sum received by him after the passage of the fee and salary law of 1871. Wherefore, etc.

Following the complaint in the record is this agreement:

"I, Joseph R. Shelton, the within-named defendant, hereby waive the issue and service of process on me in said action, and enter my appearance thereto. I further waive all objection to the form of the action, and that the same is not on my official bond, said action being brought in this form, and not on my bond, but against me alone, by agreement, at my instance, the object being to have determined, in the most direct and least expensive mode, whether I am liable for interest received by me on deposits of money in my hands, while acting treasurer of said county of Morgan. I reserve the right to demur to the complaint, on the ground that the facts stated do not make a cause of action against me, and, upon proper answer, to defend said action on its merits.

"J. R. SHELTON

"February 5th, 1872."

Any further statement of the facts, to show how the question for decision is presented, is deemed unnecessary. The question is this: Is the defendant liable to pay over the amounts collected and received by him as interest, as aforesaid, on the public moneys which came to his hands, and which were by him loaned to and deposited with the bank? The question is argued, with their accustomed ability, by counsel on both sides.

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It is claimed by counsel for the appellees, that the money in the hands of the treasurer was so far trust funds, and the treasurer so far in a fiduciary relation to the county, or as an agent of the county, that all the profits made by him from loans of the money followed the ownership of the principal fund, and belonged to the county.

Counsel for the appellant, on the contrary, contend that the appellant did not stand in any fiduciary relation to the county or its funds, nor did he occupy the position of an agent of the county, and, consequently, was not liable to account for such interest.

Counsel for appellees cite and rely on the following authorities: *Docker v. Somes*, 8 Eng. Ch. 172; Story on Agency, §§ 16, 207, 210, 306; Dunlap's Paley's Agency, 49; *Diplock v. Blackburn*, 8 Camp. 43; *Earl of Lonsdale v. Church*, 3 Bro. C. C. 41; *Massey v. Davies*, 2 Ves. Jr. 317; *Michoud v. Girod*, 4 How. (U. S.) 503; 1 G. & H. 641, §§ 7, 8; *Utica, etc., Co. v. Lynch*, 11 Paige, 520; *Barney v. Saunders*, 16 How. (U. S.) 535; *U. S. v. Prescott*, 3 id. 578; and *U. S. v. Morgan*, 11 id. 164.

Counsel for appellant cite the following authorities upon the main point: 2 Spence's Eq. Jur. 917; 2 Story's Eq., §§ 1268, 1272, 1273; *Brice v. Stokes*, 2 Lead. Cas. Eq. (4th ed.) 1742, *et seq.*; *Supervisors, etc. v. Dorr*, 25 Wend. 440; *Muzzy v. Shattuck*, 1 Den. 233; *Inhabitants, etc. v. Hazzard*, 12 Cush. 112; *Inhabitants, etc. v. Bell*, 9 Metc. 499; *Commonwealth v. Comly*, 3 Penn. St. 372; *U. S. v. Prescott*, *supra*; *East India Co. v. Henchman*, 1 Ves. Jr. 287; *Massey v. Davies*, *supra*; *Beaumont v. Boulbee*, 7 id. 599; *Prevost v. Gratz*, Pet. C. C. 364; *Campbell v. Penn. Life Ins. Co.*, 2 Whart. 58; *Bartholomew v. Leech*, 7 Watts, 472; *Michoud v. Girod*, *supra*; *Barney v. Saunders*, *supra*; *Diplock v. Blackburn*, *supra*; *Newton v. Bennet*, 1 Bro. C. C. 359; *Perkins v. Bayntun*, id. 375; *Forster v. Forster*, 2 id. 617; *Treves v. Townshend*, id. 1 384; *Brown v. Litton*, 1 P. Wms. 140; *Ratcliffe v. Graves*, 1 Vern. 196; *Lee v. Lee*, 2 id. 548; *Hicks v. Hicks*, 3 Atk. 274; *Earl of Lonsdale v. Church*, *supra*; *Ohedworth v. Edwards*, 8 Ves. Jr. 47.

We cannot, in this opinion, examine specially all these authorities. None of them relate to the case where a public officer having the custody of money has made a profit by loaning it to or depositing it with another person or with a corporation; but they are cases where a trustee or an agent has made a profit by using, loaning or depositing the money of his *cestui que trust* or principal. We have not been referred to, nor have we found any case where the rule has been applied to a public officer. In this State, the rule of liability of officers charged with the custody of public moneys is very strict. They have been held to almost, if not quite,

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the same degree of liability as if they were insurers of the safety of the money, and no degree of diligence or care has shielded them from such liability in case of its loss. This could not be held, to well-settled principles of law, if the officer was only the agent of the county, or the custodian of the money, the ownership of the specific money being in the county. If the specific money remains the property of the county, then the officer could not, with any propriety, be held liable for its loss, unless such loss accrued through his negligence. But such has not been held to be the measure of his liability. The liability has been held to grow out of the unconditional and unlimited engagement which the officer assumes in giving his official bond and taking upon himself the duties and responsibilities of the office. It is probably the correct rule, that when the officer has complied with the terms of his official bond, by keeping the money safely during the term of his office, by paying it out when legally required during his term, or accounting for and paying the same over to the proper person or authority at the expiration of his term, he has done all that the law and the terms of his bond require of him. He is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. The money which he receives becomes his own money, and when he has accounted as required by law and by the terms of his bond, nothing further can be required of him. *Rock v. Stinger*, 86 Ind. 846. If the legislature has provided, or shall provide, that money, in such case, shall remain specifically the money of the county, a different rule would prevail. No such regulation is found applicable to the money from which the profits were derived, that are in question in this case.

The judgment is reversed, with costs, and the cause remanded.

 GROVER AND BAKER SEWING MACHINE COMPANY V. BUTLER.

(53 Ind. 454.)

Patents — right of State legislature to interfere with sale of.

A State statute required foreign corporations as a condition precedent to the transaction of their business in any county of the State, to deposit in the office of the county clerk, a power of attorney authorizing their agents to transact business for them and the service of process on said corporations by service on such agents. *Held* not to apply to corporations engaged in the manufacture and sale of articles covered by letters patent.*

ACTION on a promissory note. The opinion states the case.

* Compare *Patterson v. Commonwealth*, post 220.

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Troxell, Ward & Graham, for appellant.

Howe, J. This is an action by appellant, the payee, against appellee, the maker of a promissory note. Appellee's answer states, in substance, that appellant is a foreign corporation, not organized under the laws of this State; that the note sued upon was executed to appellant in Newton county, Indiana, in consideration of a sewing-machine, sold to appellee by one J. F. Kitsmiller, who represented himself a duly authorized agent of the appellant in said county, and that said Kitsmiller did not deposit in the office of the clerk of said Newton county any power of attorney or other authority from appellant, authorizing said Kitsmiller to transact business in said county in appellant's name, and authorizing service of process on appellant, by service on said Kitsmiller, in said county.

To this answer appellant demurred, upon the ground that it did not state facts sufficient to constitute a defense to the action. The demurrer was overruled and appellant excepted.

Appellant then replied specially to the answer, that the sewing-machine, sold by appellant to appellee, as alleged in the answer, and for which the note in suit was executed, was an article or implement, the sole and exclusive right and privilege of the manufacture and sale of which were, prior to and at the time of said sale thereof, vested in appellant by virtue of certain letters-patent, issued by the government of the United States of America, on the 22d day of June, 1852, to William O. Grover and William E. Baker, and re-issued on the 6th day of July, 1858, by said United States, to the appellant, and extended by said United States on the 21st day of June, 1866, for seven years from that time, and by virtue also of the assignment to appellant, by said Grover & Baker, of their right, title, interest, claim and demand in, to and under said letters-patent, and the re-issue and extension thereof. Copies of the re-issued letters-patent, and of the extension thereof, and of said assignment, are filed with and made part of said reply. And appellant then averred in said reply, that the sewing-machine, in said answer mentioned, was manufactured and sold to appellee by the appellant, pursuant to the authority and under and by virtue of the franchise vested in and secured to appellant in manner and form aforesaid, and not otherwise.

To this reply appellee demurred, upon the ground that it did not state facts sufficient to constitute a reply to appellee's answer. This demurrer was sustained by the court below, and to this decision appellant excepted. And appellant refusing to amend its reply, judgment was rendered for the appellee, upon his demurrer.

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In this court, the appellant has assigned the following errors, on the record :

1. The overruling of appellant's demurrer to appellee's answer.
2. The sustaining of appellee's demurrer to appellant's reply to the answer.

The first alleged error was intended, we suppose, to present to this court, for its consideration, the sufficiency of the facts stated in appellee's answer to constitute a defense to this action. As, however, the appellant's attorneys, in their brief on file in this cause, have completely ignored this first alleged error, we shall, in conformity with the well-established practice of this court, regard this error as waived by the appellant, and will neither consider nor decide any question thereby presented, or intended to be presented, for our determination.

A more interesting question, however, is presented for the consideration of this court, by the alleged error assigned upon the ruling of the court below on appellee's demurrer to appellant's reply to the answer. In this reply, appellant virtually admitted the facts stated in appellee's answer to be true ; and in avoidance of the legal conclusion heretofore considered as resulting from those facts, the appellant then stated, in substance, that, by virtue of certain letters-patent, issued by the government of the United States to William O. Grover and William E. Baker, and of their assignment of their right, title, interest, claim and demand in, to and under said letters-patent to the appellant, and of the re-issue and the extension of said letters-patent by the United States to the appellant, the exclusive right and privilege to manufacture and sell the sewing-machines, the sale of one of which machines was the consideration of the note in suit, was vested in the appellant, prior to and at the time of the sale to appellee. And then it is averred in the reply, that the sewing-machine, mentioned in appellee's answer, was manufactured and sold by appellant to appellee, pursuant to the authority, and under and by virtue of the franchise vested in and secured to appellant in manner and form aforesaid, and not otherwise.

The act respecting foreign corporations and their agents in this State is broad and comprehensive in its terms, and contains no exceptions. It has been recognized by this court as a valid law. But can it be held to apply to this case, as the same is made by the averments in appellant's reply ? In this State, it is conceded that the Constitution of the United States and the acts of Congress pursuant thereto and in conformity therewith are the supreme law of the land. In so far, therefore, as an act of the general assembly of this State is in conflict with this supreme law of the land, that far forth, at least, the act of the State legislature is inoperative and of no binding force.

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Section 8 of the first article of the Constitution of the United States provides, that "the Congress shall have power," *inter alia*, "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 1 R. S. 1876, pp. 5, 6. The power thus vested in Congress is not expressly an exclusive power, but practically it has been so regarded and acted upon, since the adoption of the Constitution. Under this power, Congress has legislated from time to time, as it was deemed advisable, since the organization of the government. Under this legislation it has generally been provided that the letters-patent, issued in conformity therewith, should contain, among other things, a grant to the patentee, his heirs or assigns, for a specified and limited time, of the exclusive right to make, use and vend the invention or discovery, throughout the United States and territories thereof. To this effect is the language used in section 4,884, of the Revised Statutes of the United States, page 958 ; and in this respect the language there used does not differ materially from the language used in previous legislation by Congress on the same subject. In the case now under consideration, the letters-patent, re-issued to appellant, a copy of which is filed with and made part of the reply, contain a grant to appellant, its successors or assigns, for a limited time, of "the full and exclusive right and liberty of making, constructing, using and vending to others to be used" the improved sewing-machine mentioned therein. In the reply, it is averred that the appellant, under and by virtue of the right and liberty granted in its letters-patent, and the extension thereof, and pursuant thereto, had manufactured and sold to the appellee the sewing-machine mentioned in his answer, in consideration of which sale both parties admit that the note in suit was executed.

If the facts stated in the reply are true, and, if well pleaded, their truth is admitted by appellee's demurrer to the reply, then at the time of the sale of the sewing-machine to appellee, and at the time of the execution of the note sued upon, the appellant undoubtedly held, under the Constitution of the United States and the acts of Congress pursuant thereto, the full and exclusive right to make, use and vend, in this State the sewing-machines mentioned in its letters-patent. Now, the question arises, was that right, so held by appellant, a foreign corporation, affected in any manner by the provisions and requirements of the law of this State, before mentioned, respecting foreign corporations, and their agents in this State?

Upon this question we have not been able to find any reported case which is directly in point. *Ex parte Robinson*, 2 Bissell, 309, was a

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decision of the U. S. Circuit Court, for the District of Indiana, upon a statute of this State, the object of which, as expressed in its title, was "to regulate the sale of patent-rights, and to prevent frauds in connection therewith." 3 Ind. Stat. 864. In that case, DAVIS, J., in rendering the decision, used this language: "The property in inventions exists by virtue of the laws of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution."

In *Helm v. The First National Bank of Huntington*, 43 Ind. 167, the language of DAVIS, J., just recited, is quoted by BUSKIRK, J., in his opinion, with approval. In this latter case, this court held that the statute of this State, entitled, "An act to regulate the sale of patent-rights, and to prevent frauds in connection therewith," *supra*, which became a law, without the approval of the governor, on the 23d day of April, 1869, was unconstitutional and void. The doctrine of this case, as we construed it, is, that no State has a right to interfere by legislation with the enjoyment of property in inventions, as secured by letters-patent of the United States, or to annex conditions to the grant; and the conclusion we deduce from this doctrine is, that none of the legislation of this State should be so construed as to interfere with the enjoyment of such property, or to annex conditions to such a grant. Where a foreign corporation is the owner, either as patentee or assignee, of letters-patent issued by the United States, and the transactions of such corporation, in this State, are connected with the manufacture, use, or sale of the invention described in such letters-patent, we hold that the provisions and requirements of the act of this State, entitled "An act respecting foreign corporations and their agents in this State," approved June 17th, 1852 (1 R. S., 1876, p. 373), do not apply to such foreign corporation or its agents in this State, in such transactions in this State.

It follows, therefore, that the court below erred in sustaining appellee's demurrer to the reply.

The judgment is reversed, at the costs of appellee, and cause remanded, with instructions to the court below to overrule the demurrer to the reply, and for other proceedings.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

BELL V. FARMERS' BANK OF KENTUCKY.

(11 Bush. 34.)

Deed—delivery of—registry before delivery.

A deed was duly signed, sealed and recorded, but was not delivered to the grantee nor accepted by him until long after. *Held*, that although as between the grantor and grantee it might take effect from the date when it was left for record, yet as against attaching creditors it took effect only from the time of delivery and acceptance by the grantee.*

PETITION in equity for the determination of the priority of liens on real property. The opinion contains all the facts given in the original report.

John B. Cochran, for appellant.

Barr, Goodloe & Humphrey, A. J. James, Muir, Bijur & Davis, A. G. Booth, Bodley & Simrall, L. N. Dembitz, Byron Bacon, Geo. Weissinger, for appellees.

LINDSAY, J. Bell resided in the city of New York at the time the mortgage purports to have been delivered and acknowledged.

In answer to the question as to when he was first informed of its execution, he says, "After I returned from New York late in the fall of 1866 I got the impression from my attorney that there was a mortgage

* Compare *Hawkes v. Pike* (105 Mass. 560), 7 Am. Rep. 554; *Kingsbury v. Burnside* (58 Ill. 310), 11 id. 67.

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on a plantation to secure my Thompson claims, which I took to be a southern plantation, and regarded it as having only a prospective value, if any, and, being about half the time from home, paid no attention to any of these claims, and first learned about a year ago (Oct. 2, 1871) that the mortgage was on a farm in Jefferson county, Kentucky."

The mortgage was not delivered to Bell in person at or before the time it was acknowledged and put to record. In disclosing this fact he does not intimate that it was delivered to his attorney. We cannot assume that the attorney would have delayed from May, 1868, until late in 1866 to inform his principal of his action if he had accepted the mortgage or been in any way connected with its execution and registry; nor can we assume that he would have been so utterly ignorant as to the character and amounts of his client's claims as the draftsman of the instrument evidently was.

The acceptance of the co-mortgagees avails nothing in Bell's favor under the circumstances of this case. Their interests were antagonistic to his, and the presumption is that they accepted for themselves. It is true, in the absence of proof to the contrary, we might presume that their acceptance was for the benefit of all the grantees; but the question still remains as to how far this unauthorized acceptance will inure to the benefit of Bell, who had no knowledge of the fact, and who did not become acquainted with the provisions of the mortgage until long after the attachment liens under which these appellees' claim had attached to the mortgaged property.

The legal presumption arising from the acknowledgment and registry of a deed, and the necessity for its delivery, were considered and determined by this court in the recent case of *Thompson's heirs, etc. v. Jackson, etc.*, 10 Bush, 424. The court said that under the circumstances of that case "to hold that the title passed from Thompson to Robards before the judgment lien of the commonwealth attached would be to decide that a party can become the purchaser of land without his knowledge or assent, and that the acceptance of a deed of conveyance is not necessary for the transmission of the title from the grantor to the grantee. . . .

In Washburn on Real Property, vol. 2, side-page 581, the author says, "That the better opinion seems to be that no deed can take effect as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an acceptance of it."

After referring to cases bearing upon the doctrine of presumptive acceptance the court continued: "But in neither of these cases is it intimated that the acceptance is not essential, nor that the presumption

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arising from the delivery indicated (i. e., to the registering officer or to a third party) is in general conclusive of the question of acceptance."

In the case of *Tuttle v. Turner*, 28 Tex. 759, the court held that "it is essential to the operation and validity of a deed, if not actually delivered to the grantee or his agent authorized to receive it, to prove notice to him of its existence and such additional circumstances as will afford a reasonable presumption of his acceptance of it," and that "the presumption that a party will accept a deed because it is beneficial to him, it is said, will never be carried so far as to consider him as having accepted it." Kent says, "Delivery is another incident essential to the due execution of a deed, for it takes effect only from delivery."

A deed delivered to the registering officer or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as between the grantor and the grantee from the time of the first delivery; and in such cases volunteers claiming under and through the grantor and ordinary creditors who have acquired no lien upon nor interest in the estate conveyed are entitled to no greater consideration than the grantor. Yet, until the grantee is informed of the execution of the deed and does some act equivalent to an acceptance of it, it is manifest that he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his heirs, devisees, and ordinary creditors. But this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to, an interest in, or a lien upon the property before the date of the actual acceptance. As in the case of an escrow, whenever it becomes necessary for the purposes of justice that the true time of the acceptance of a deed so delivered shall be ascertained the legal fiction will be disregarded, and the intervening claimant or lien-holder allowed to show the actual facts of the transaction. *Goodsell v. Stinson*, 7 Blackf. 439.

In the case of *Kennard v. Adams*, 11 B. Mon. 102, the controversy arose between an attaching creditor and a mortgagee who had not been apprised of the execution and registry of the mortgage until after the attachment had been levied. If the attachment had been sustained, and the relative rights of the attaching creditor and the mortgagee adjudicated, it would have been a case in point; but the attachment was discharged, and the mortgaged property thereby freed from the lien, and the doctrine of presumed acceptance then applied in favor of the mortgagee.

In this case the attachments were sustained, and the attaching creditors are insisting that the legal fiction shall not be so applied as to sub-

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ordinate their liens to that of Bell, they having attached long before the time he accepted or could have accepted the mortgage under which he is now proceeding.

To adjudge his lien superior to those of the attaching creditors would be not only to prefer the inattentive and negligent to the vigilant and active, but to allow a presumption of law, which is not conclusive and which is open to be rebutted by proof, "for the purposes of justice," to override the testimony of the party who is claiming the benefit of that presumption.

We have carefully examined the cases relied on by appellant. In the case of *Garnons v. Knight*, 8 Dow. and Ry. 848, the right of an intervening claimant as against a party claiming under a presumptive acceptance of a mortgage is not made a question; and it appears that the second mortgage was to secure the payment of a debt or claim created under circumstances of a character so suspicious as not to entitle the mortgagee to attack the first mortgage as void under the statutes of Elizabeth.

The case of *Belden v. Carter*, 4 Day, 66, was a controversy between the heirs at law of the grantor and the grantee in his deed; and in *Somerby v. Arden*, the grantor sought to avoid his own deed upon the ground that it had not been delivered to the grantee in person nor to any one authorized by her to accept it.

The only case to which our attention has been called in which it is intimated that the presumed acceptance of a deed will defeat the lien of an intervening attaching creditor is that of *Greenville v. King*, 50 Mo. 477, and it is a little remarkable that it appears from the report of that case that no such question was raised in the argument.

But it is immaterial whether the question was or not directly presented to the court. We are of opinion that the doctrine is contrary to the decided weight of authority, that it is not supported by reason, and that its adoption would open the door to fraudulent preferences in a multitude of cases in which they will not be attempted if the rule announced in the case of *Thompson v. Jackson*, *supra*, is adhered to.

We do not concur with counsel in his construction of section 11, chapter 24 of the Revised Statutes. Under that section a mortgage could not become valid and effectual until acknowledged or proved and lodged for record; but there is nothing in the section from which it can be inferred that the legislature intended to dispense with the necessity of a delivery.

A mortgage ought to be delivered before being acknowledged or proved; but the fact of acknowledgment or proof does not raise a conclusive presumption that it had theretofore been delivered.

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In this case, after giving proper weight to all legal presumptions to the contrary, we are constrained, from the statements of the mortgagee himself, to conclude that the mortgage was not accepted by him in person or by any one having authority to accept for him until long after the attachments had been levied and the attachment liens created.

The question of the delivery of the mortgage is distinctly raised by each and all of the defendants to Bell's cross-action.

Our conclusion on this branch of the case dispenses with the necessity of an examination of the other questions presented by the record and considered in the argument.

Upon the two appeals — the one against the Farmers' Bank and the other against Robert H. Hays — the judgment is affirmed.

GAAR V. LOUISVILLE BANKING COMPANY.

(11 Bush, 180.)

Negotiable instruments — agreement to pay attorney's fees.

A bill of exchange, in form negotiable, had an agreement indorsed upon it "to pay a reasonable attorney's fee to any holder thereof if the same shall hereafter be sued upon." *Held*, that the indorsement did not destroy the negotiability of the bill. See note, p. 212.)

ACTION by appellee against appellant and others on the following instrument :

"LOUISVILLE, KY., January 27th, 1873.

"Four months after date pay to the order of J. M. Bryant ninety-four hundred and twenty and four hundredths dollars, value received, negotiable and payable at the office of the Louisville Banking Company.

"\$9,420.04.

(Signed)

W. H. BEYNROTH."

Addressed to Morris, Southwick & Co., Louisville, Ky. ; accepted by them, and indorsed by J. M. Bryant, H. S. Gaar, P. G. Kelsey, and J. T. Morris. On the back of that paper this agreement appears :

"The drawers, indorsers, and acceptors of this bill agree to pay a reasonable attorney's fee to any holder thereof, if the same shall hereafter be sued upon, and also pay interest at the rate of ten per cent per

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annum after maturity until paid, and all are equally bound as drawers and indorsers, as if this bill were in the form of a joint note.

“(Signed)

MORRIS, SOUTHWICK & Co.,
W. H. BEYNROTH,
J. M. BRYANT,
H. S. GAAR.”

The petition contained three paragraphs.

The first paragraph set forth the principal writing, and declared on it as a bill of exchange.

In the second paragraph it was alleged that at the time the bank purchased the bill Bryant, Beynroth, and Gaar indorsed to it, as collateral security, three notes executed by Morris, Southwick & Co. to them, dated January 28, 1878, the first two being for the sum of \$5,000 each, due in eighteen months, and the third for \$6,000, due in twenty-four months, secured by the mortgage on real estate and bearing interest from date at the rate of ten per cent per annum. It was also alleged that Morris, Southwick & Co. had no defense to the notes. The bank prayed for judgment enforcing its lien on the notes, and for a sale thereof in satisfaction of the bill.

In the third paragraph, the writing indorsed on the back of the bill was set up, and judgment was prayed thereon for ten per cent interest on the amount of the bill from its maturity until paid, and for \$500 as an attorney's fee.

Gaar demurred to the second paragraph upon the ground that it did not state facts constituting a cause of action. The demurrer was sustained; and the bank failing to plead further in that behalf, the second paragraph was dismissed and the cause transferred to the Jefferson Court of Common Pleas, where both Gaar and Bryant demurred to the petition; and their demurrer having been overruled they answered, and a trial was had, which resulted in a verdict and judgment against them for the amount of the bill, with interest thereon at ten per cent per annum from maturity until paid, and from that judgment they have appealed; and the bank prosecutes a cross-appeal to reverse the judgment of the Chancery Court dismissing the second paragraph of the petition.

Russell & Helm and Barr, Goodloe & Humphrey, for appellants.

A Barnett, for appellee.

CORER, J. [After stating the facts and deciding an unimportant point.] 2. The ground of the demurrer is, that although the writing de

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clared on in the first paragraph when taken by itself is a bill of exchange, the writing indorsed on the back thereof, in which the signers agreed to pay an attorney's fee in case the bill should be sued on, destroyed its negotiability. This argument is based on the fact that the amount of the attorney's fee agreed to be paid was not ascertained, and hence it is contended that the bill was for an uncertain amount.

A bill of exchange has been defined to be a written order or request by one person to another for the payment of a sum of money, absolutely, and at all events; and as bills are designed to take the place and perform the office of money, there must be no chance of mistake as to the amount of money of which they thus take the place. On this point therefore the adjudged cases are quite stringent. The sum must be stated definitely, and must not be connected with any indefinite or uncertain sum. 1 Parsons on Notes and Bills, 37; Story on Bills, §§ 42-45.

It has accordingly been held that an instrument in the form of a note promising to pay a specified sum at a designated place on a named day, "*current rate of exchange added*," was not a note, because the current rate of exchange was unascertained and uncertain. *Atkinson v. Manks*, 1 Cow. 707. And in *Davies v. Wilkinson*, 10 Ad. & E. 98, it was held that the following instrument was not a note: "I agree to pay to D. £695 at four installments," the first on, etc., "being £200," and so on, specifying three others amounting in the aggregate to £600. "The remaining £95 to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him."

In *Cushman v. Haynes*, 20 Pick. 133, it was held that an acceptance for an uncertain amount — to wit, "the balance of goods not then sold" — was not negotiable.

Other cases to the same effect might be cited, but it is deemed unnecessary, as the rule of the law merchant undoubtedly is that it is an indispensable quality of a note or bill that it shall be for a definite sum in order that it may be negotiable.

But it by no means follows from this conclusion that the negotiability of the paper sued on was destroyed by the agreement indorsed thereon that the parties would pay an attorney's fee if the debt had to be sued for.

In the cases cited, and others referred to by counsel, the amount to be paid at the maturity of the note or bill was uncertain, and it was that fact which destroyed their negotiability; but in this case the amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose.

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The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money the amount which it entitles the holder to demand must be fixed and certain ; but when it is past due it ceases to have that peculiar quality denominated negotiability, or to perform the office of money ; and hence any thing which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent its becoming negotiable paper. Until the paper in question matured the amount due upon it was fixed and certain, and it might, therefore, take the place of money ; when it became overdue, that fact put an end to its career, and then for the first time the amount to which the holder was entitled became uncertain, or rather might be made uncertain by bringing an action on the bill against the parties who signed the agreement indorsed thereon.

We are, therefore, of the opinion that the demurrer was properly overruled.

Judgment affirmed.

NOTE.—See, to the same effect, *Stoneman v. Pyle* (35 Ind. 103), 9 Am. Rep. 637, and *contra*, *First National Bank v. Gay*, *post*. The Supreme Court of Kansas has recently (July, 1877) made a decision in accordance with the foregoing principal case (*Seaton v. Scoville*, 16 Alb. L. J. 148), while the Supreme Court of Pennsylvania has held the reverse. *Woods v. North*, 16 Alb. L. J. 116. That portion of the decision of the Supreme Court of Kansas bearing on this question is as follows :

BREWER, J., delivered the opinion of the court.

This was an action upon the following note :

“ \$250.00.

TOPEKA, KAN., June 24, 1874.

“ Thirty-nine days after date we promise to pay to the order of John Seaton, at the Topeka Bank and Savings Institution, Topeka, Kansas, two hundred and fifty dollars, with interest at twelve per cent per annum after due until paid ; also costs of collecting, including reasonable attorney's fees, if suit be instituted on this note. Value received.

“ Topeka Rolling Mill Co., by

“ R. D. COLDREN, President.”

And the first question presented is, whether this was a negotiable note ; and the claim is, that because of the stipulation for payment of costs of collection and attorney's fees, the amount due on the paper is uncertain, while both the common law and the statute define negotiable paper as drawn for a “sum or sums of money certain.” Story on Prom. Notes, § 1 ; Gen. Stats., § 1, p. 114. This claim cannot be sustained. The amount due at the maturity of the paper is certain, and the only uncertainty is in the amount which shall be collectible in case the maker defaults at the maturity of the paper in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection. In the case of *Sperry v. Harr*, 32 Iowa, 184, the stipulation of the note was : “ If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney's fees therefor,” and the note was held to be negotiable. The court say, in the opinion : “ The agreement for the payment of attorney's fees in no

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sense increased the amount of money which was payable when the note fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection, than to the sum which the maker is bound to pay. It is not different in character from a *cognovit*, which, when attached to promissory notes, does not destroy their negotiability."

The same proposition is affirmed in *Garr et al. v. Louisville Bank Co.*, 11 Bush (Ky.), 180, in which the court declares that "the reason for the rule, that the amount to be paid must be fixed and certain, is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated negotiability, or to perform the office of money, and, hence, any thing which only renders its amount uncertain, after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent its becoming negotiable paper." *Dietrich v. Baylie*, 23 La. Ann. 767; *Stoneman v. Pyle*, 35 Ind. 103. That it is no longer an open question in the latter State is evident from the cases of *Wyant v. Pottorf*, 87 Ind. 512, and *Walker v. Wollen et al.*, 4 Cent. L. J. 248. See, also, *Dinsmore v. Duncan et al.*, 57 N. Y. 573; S. C., 15 Am. Rep. 534, and *Zimmerman v. Anderson*, 67 Penn. St. 421; 5 Am. Rep. 447, in which last case a stipulation, waiving appraisalment, stay of execution, etc., was held not to affect the negotiability of the paper. *Bradley v. Lill*, 4 Biss. 473, in which the promise was to pay a certain amount with exchange, and the amount of exchange not stated, and still it was held to be negotiable. And, on the same point, see *Smith v. Kendall*, 9 Mich. 241; *Johnson v. Frisbie*, 15 id. 286; *Leggett v. Jones*, 10 Wis. 84; *Gutacap v. Woulwise*, 2 McLean, 581; *contra*, *Bank v. Gay*, 63 Mo. 33; *Samstag v. Conly et al.*, 5 Cent. L. J. 29. It seems to us, however, a just conclusion that paper, otherwise negotiable, is not rendered non-negotiable by a stipulation for the payment of costs of collection, including attorney fees, in case suit is brought thereon."

The case of *Woods v. North* was an action by the plaintiffs below, North and others, who were the holders of an accommodation note drawn by Samuel Steffey, and indorsed by the defendant below, Woods. The note upon which the action was founded was in the following form, to wit:

"\$377.00.

HUNTINGDON, PA., May 5, 1875.

"Sixty days after date I promise to pay to the order of W. H. Woods, at the Union Bank of Huntingdon, three hundred and seventy-seven dollars, and five per cent collection fee if not paid when due, without defalcation. Value received.

"SAMUEL STEFFEY."

The protest of this note at its maturity had been waived by an indorsement on the back of the note signed by Woods. It appeared upon the trial that this note was but a renewal of another note, which also was a renewal, the original note having been discounted for the benefit of the drawer by the bank on the 28th of August, 1871, and renewed from time to time.

The defense made by the defendant below at the trial was, first, that the note, because of the insertion of the clause, "and five per cent collection fee if not paid when due," was not negotiable, and therefore the defendant was not liable for his indorsement. The reception of the note in evidence was objected to upon this ground, but the objection was overruled and the note admitted, and defendant took a writ of error to this court. Other defenses not material here were also set up.

Opinion by SHARSWOOD, J.

It is a necessary quality of negotiable paper that it should be simple, certain, uncom-

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ditional, and not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its vigor. Applying it to the note sued upon in this case, we are of opinion that it violates the rule. If it had been made payable at sixty days with five per cent it would have been objectionable as usurious on its face. It would not, however, on that account have invalidated the note or destroyed its negotiability. A negotiable note may be made payable with interest from its date, and if more than lawful interest is stipulated for, it does not, in Pennsylvania, make the contract void, but only the usury. Hence, such a note is sufficiently certain. It is payable at maturity with lawful interest. But in the paper now in question there enters as to the amount an undoubted element of uncertainty. It is a mistake to suppose that if the note was unpaid at maturity the five per cent would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase "collection fee" necessarily implies this. Not only so, but this amount of percentage cannot be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. This in reason and the usage of the legal profession depends upon the amount of the note. Five per cent would, probably, be considered by a jury as a reasonable compensation upon the collection of a note of \$377. But if it were \$3,000 they would, probably, think otherwise, and certainly so if it were \$30,000. How then can this note be said to be certain as to its amount, or that amount unaffected by any contingency? Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not alter its negotiability. Neither does a clause waiving exemption, for that in no way touches the implicitness and certainty of the paper. But a collateral agreement as here, depending, too, as it does upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may be well characterized like an agreement to confess a judgment was by Chief Justice Gibson, as "luggage," which negotiable paper, riding, as it does, on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contention and litigation result. It is the best rule, *obsta principiis*.

UNITED SOCIETY OF SHAKERS V. UNDERWOOD.

(11 Bush, 265.)

Joint tort-feasors — judgment against one when not a bar to action against others — measure of recovery — estoppel.

Plaintiff recovered judgment in an action of tort against one who was jointly liable with defendant, which judgment was satisfied in part; and afterward brought this action for the same cause. *Held*, (1) that to constitute the first judgment a bar to this action it must have been fully satisfied, and (2) that defendant having pleaded the first judgment in bar, both parties were concluded by it as to the measure of recovery in this action.

ACTION for conversion. The opinion states the case. See further facts, S. C., 15 Am. Rep. 731.

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John Mason Brown, M. C. Johnson and Thomas Hines, for appellants.

J. R. Underwood, T. U. and D. W. Lindsey and Craddock & Trabee, for appellees.

LINDSAY, J. Counsel have argued this case upon the hypothesis that the appellees, if liable at all, are to be held to account for all the bonds sold by Calvert, the cashier of the bank, whether their proceeds were or not applied to the uses and purposes of that institution. Such is not the case.

The gist of the action is that the *bank*, through its officers, fraudulently converted to its use and emolument certain of the appellants' bonds, which it held on special deposit, and that the conversion took place under such circumstances as to render the appellees (the president and directors of the bank) answerable therefor.

In the opinion of this court* rendered upon a former appeal in this cause, it was said: "But the liability of the bank does not depend alone upon the averment of want of care and fidelity upon the part of the directors. It is specifically charged that the deposits were sold by its officers and the proceeds thereof converted to its use and emolument with the knowledge of the directors." And again: "These appellants allege that their bonds were sold by the officers of the bank and the proceeds paid out in the satisfaction of claims against it and in the payment of dividends to its stockholders; and that of all this appellees had notice."

"Having notice, it was their duty, and they had full power in the premises, to prevent the sale. Failing in this, their subsequent action in directing the proceeds, or some portion thereof, to be paid out in the shape of dividends to the stockholders, including themselves, was a ratification of the conversion which they had theretofore wrongfully permitted."

The petition was held to be good "upon the ground that if the officers of the bank sold the special deposits and used the proceeds in the business of and for the uses and purposes of the bank, and the proceeds were so used through the active agency of the directors, then they are personally liable by reason of their participation in the tort, and they cannot escape liability, because they were not aware that they were wrongfully using the proceeds of a depositor's property, when this want of information was the result of their willful inattention to and gross negligence in the discharge of their official duties." *Ray's Adm'rs v. Bank of Kentucky*, 10 Bush, 855.

* 9 Bush, 609; S. C., 15 Am. Rep. 781.

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We regard it as plain that appellants' petition does not authorize a recovery for a greater sum than the value of such of their bonds on special deposit as were sold and appropriated to the uses and purposes of the bank.

It is proper before proceeding further to consider the effect of the plea in bar, based upon the adjudication in bankruptcy of appellants' claim against the Bank of Bowling Green. It is averred by Underwood, one of the appellees, that after the Bank of Bowling Green was declared a bankrupt by the District Court of the United States for the district of Kentucky, the appellants herein appeared in that court and set up their claim against said bank for the appropriation and conversion of the identical bonds in controversy in this action, and that they succeeded in said District Court in obtaining judgment against the assignee of the bank for the sum of \$35,784.21, for and on account of said bonds, and that a large portion of said judgment has been paid by the assignee. Afterward, by a joint amended answer, all the appellees set up the same facts and charged that the sum paid on the judgment by the assignee amounted to \$26,875.

Before the filing of this amended answer appellants demurred to so much of Underwood's answer as set up said recovery and payment. As the demurrer was general in its nature, and as the plea was undoubtedly good to the extent that it averred payment or partial satisfaction of the claim, it was properly overruled. But as appellees now insist that the plea presents a complete defense to the action, and as appellants claim that the judge presiding at the trial in the court below was of that opinion, and in consequence thereof gave the peremptory instruction to the jury to find for the appellees, it is proper that we shall consider it in that view.

This court, in the case of *Elliott v. Porter*, 5 Dana, 299, expressly dissented from the doctrine of the English cases commencing with *Brown v. Wotton*, Cro. Jac. 73, and stated the rule to be that a judgment against one co-trespasser or wrong-doer will not *per se* bar a subsequent action against a different defendant for the same, or a different asportation or conversion of the same property, and that in such a case to make out a bar it is necessary to show not only the first judgment, but also that it has been satisfied or released. The rule as thus stated has never been questioned in this State. It is in harmony with the decided weight of American authority, and its enforcement is calculated to secure the ends of justice, and is demanded by sound public policy.

In the late case of *Lovejoy v. Murray*, 8 Wall. 1, the Supreme Court of the United States carried the doctrine even further and held, as we

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think correctly, that a judgment for a wrongful conversion of property against one co-trespasser, even when partly satisfied, will not bar an action against another. In the last-named case, as in the leading cases of *Elliott v. Porter* and *Sheldon v. Kibbe*, 8 Conn. 214, the doctrine that the judgment alone vests the title of the property converted in the defendant is repudiated as not sustained by authority, and as incapable of being maintained on principle.

But in the case before us for adjudication we have another, and, it seems, an unsettled question.

When a party sues one of several wrong-doers for a conversion or destruction of his property and recovers a judgment which he elects to enforce, and which is in part satisfied, is he not estopped in a subsequent action against a different defendant to claim a greater sum in the way of damages than was adjudged to him in the first action?

In the case of *Elliott v. Porter* the court said: "A few old cases might be understood as assuming the true doctrine to be that the title passes by operation of law in consequence of the judgment for damages. Some more modern decisions, *contra*, require satisfaction of the judgment, and others the issuing of an execution upon it as necessary for making the initiate election to take the assessed value in lieu of the property itself perfect and irrevocable." And further: "But there can be but one satisfaction for the same wrong. When several judgments have been obtained on the same cause of action the plaintiff must elect which he will enforce, and when he shall have once elected perhaps he may be enjoined from proceeding on another."

In the case of *Knott v. Cunningham*, 2 Sneed, 210, the Supreme Court of Tennessee says: "The more reasonable doctrine, on the other hand, is, that as each of the wrong-doers is liable for his own act, separate actions may be brought at the same time, or successively, against each of the several trespassers, in each of which the plaintiff may proceed to judgment. But as he can claim or enforce only one satisfaction for the same injury, he must elect against which of the several he will proceed to execution for the satisfaction of his damages. If the several assessments vary in amount he may elect to take the larger sum, or if the defendants be not all solvent he may elect to proceed against the solvent party; and such election followed by actual satisfaction of that particular judgment will preclude the plaintiff from proceeding against either of the other defendants upon the judgments recovered against them, except for the costs in the respective cases, which he may enforce the collection of by execution."

In *Lovejoy v. Murray* the Supreme Court says: "It is said that the judgment represents the price of the property, and as the plaintiff has the

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judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid the price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts."

"But in all such cases what has the defendant in such second suit done to discharge himself from the obligation which the law imposes on him to make compensation? His obligation must remain, in morals and on principle, until he does this. The judgment against his co-trespassers does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser or a release to his co-trespasser do this. That is true; but when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such."

It thus appears that while the plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendant, or in case no one of them is able or can be compelled to pay the whole of the judgment rendered against him, he may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet, ordinarily, when he has made his election he will be concluded by it. The collection of one judgment extinguished the entire claim for damages, and when, as in this case, the injured party sues one of the wrong-doers, and has his damages assessed and then elects to enforce, and in fact does enforce his judgment until the estate of the defendant is wholly exhausted, he will not be allowed to say, in an action against another defendant, that the question as to amount of his damages is still an open one. It is true that his first judgment, when rendered, was but a security for his original cause of action, and until it was made productive in satisfaction thereof it did not operate to change any other collateral concurrent remedy which he may have had. *Drake v. Mitchell*, 3 East, 258. But when he voluntarily availed himself of the advantages secured to him by that judgment, and made it productive to the part satisfaction of the claim, then it did operate to modify these collateral concurrent remedies.

His right of action against the other co-trespassers was not barred, nor his claim against them extinguished, by his voluntary action in the premises; but when he determined to enforce the first judgment, and did make

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it productive, he elected to accept the amount assessed as damages as full compensation for the injury of which he complains, and to treat said judgment and his other collateral concurrent remedies as securities for a claim, the amount of which had been rendered certain by judicial action. To this conclusion it may be objected that the wrong-doers who were not parties to the first action are not bound by the assessment of the value of the bonds converted. This is true; but in such a case the plaintiff may, if he choose, decline to enforce his first judgment, and leave the question of the amount to which he is entitled an open one until he sues and recovers against all who are liable to him, and then elects which judgment he will enforce. Or he may, as these appellants have done, sue upon his original cause of action, and compel the defendants to rely upon the first judgment and the election to enforce it, either by plea or as matter of evidence, and thereby secure a correlative advantage, which we will now consider.

The appellees insist that, because they were not parties to the proceeding in the bankrupt court, they have the right to show that the Bank of Bowling Green did not convert the bonds of appellants to an amount equal to the judgment rendered in said proceedings, nor in fact to any amount whatever. To allow them to do so would be to give them the full advantage of so much of their plea as is favorable to them, and to leave such facts disclosed by it as operate to their prejudice open to controversy. This is contrary to the plainest principles of justice, and to the universally recognized rules of pleading. If the appellees choose to plead the judgment and the election of appellants to enforce it, and thereby estop them to show that they ought to recover in the action a greater sum than was adjudged to them against the bank in the proceedings in bankruptcy, they estop themselves to show that the recovery against the bank was far too great a sum, or that there should have been no recovery at all. The judgment as pleaded in this case concludes as well the appellees as the appellants, as to the conversion by the bank of the bonds, and as to the value of the bonds so converted. If such was not the case we would have a plea operating as an estoppel, without the essential element of mutuality. We would be holding the appellants to the disadvantageous consequences resulting from their election to enforce the judgment of the bankrupt court, and at the same time denying them the right to claim the compensation they elected to accept in satisfaction of their claim against all the parties answerable to them for the otherwise unascertained damages.

The mere statement of such a proposition is sufficient to demonstrate its fallacy.

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Judgment reversed, and cause remanded for a new trial upon principles consistent with this opinion.

PATTERSON v. COMMONWEALTH.

(11 Bush, 311.)

Constitutional law — limiting sale of patented articles.

A State statute provided for the inspection of illuminating oils and forbade the sale of any that would not stand a prescribed test. *Held*, that the prohibition was constitutional as applied to oils patented under the laws of the United States as well as in other cases.*

INDICTMENT under a statute. The opinion states the case.

R. K. Williams, for appellant, cited *Curtis on Patents*, 562, 154, 511, 88, 541; *Dudley v. Mayhew*, 13 N. Y. 9; *State v. Robinson*, 4 Fisher's Patent Cas. 186; *Elmer v. Pannel*, 40 Me. 434; *Tonnage Tax Cases*, 12 Wall. 209; *Phila. & Trenton R. R. Co. v. Stimpson*, 14 Peters, 458.

John Rodman, Attorney-General, *E. W. Bagby*, and *O. E. Marshall*, for appellee.

PRYOR, J. The appellant was indicted under the provisions of the statute of February 21st, 1874, entitled "An act for inspecting and gauging oils, liquids," etc. Section 6 of this act imposes a fine not exceeding \$500 upon any person or persons who shall sell or offer to sell in this State, for illuminating purposes, oils or fluids the product of coal, petroleum, or other bituminous substances that will ignite or permanently burn at a temperature less than 180° Fahrenheit, etc.; also the same penalty upon those who sell in this State such fluids after they have been condemned by an authorized State inspector, and the barrels or packages branded by him "*unsafe for illuminating purposes.*"

Appellant was engaged in selling an oil at her business house in Paducah, known as "*Aurora oil*;" and the State inspector having tested nineteen barrels of this oil, as provided by the statute, branded them "unsafe for illuminating purposes," for the reason that it failed to stand the test required by the statute. It is agreed by the parties that

* Compare *Grover & Baker Sewing Machine Co. v. Butler*, ante, p. 200.

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this oil cannot be made to conform to the requirements of the statute, and that the appellant sold the fluid as charged in the indictment. A fine of \$250 was imposed upon the appellant, from which she prosecutes this appeal.

The defense is that the oil sold by appellant was a patented article, and as assignee of Davis, the patentee, she had the right to vend it in the counties of McCracken and other adjoining counties, although in violation of the statute; that the State of Kentucky had no power to regulate by legislation the mode of selling articles for the invention of which a patent right had been obtained from the Federal government, as long as the exclusive use of the patent right is vested in the patentee or his assignee.

The power of Congress to legislate in regard to patents is derived from section 8 of article 1 of the Federal Constitution, that provides, "The Congress shall have power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The opinion of Justice DAVIS in the case of *The State v. Robinson*, 4 Fisher, 187, is relied on as sustaining the views presented by the defense in this case. There is no analogy in the facts of that case and the one before us. The legislature of Indiana enacted a law regulating the sale of patent rights, by requiring the patentee, before he disposed of the right, to file a copy of the patent in the county clerk's office, and to make an affidavit that the letters patent were genuine and had not been canceled. Robinson, as the agent of the patentee, sold or offered to sell a patent right without complying with the provisions of the statute; and having been imprisoned by the judgment of the State court for this offense, Justice DAVIS held that he should be discharged from custody for the reason "that this power had been exercised by Congress directing the manner in which patents shall be obtained, and when obtained how they shall be assigned and sold." It is further said in the opinion: "The property in inventions exists by virtue of the laws of Congress. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property."

There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A State has no power to say through its legislature that the patentee shall not sell his patent, or that its use shall be common to all of its citizens; for this would be in direct conflict with the law of Con-

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gress; and that portion of the opinion referred to, giving the patentee an unrestricted power to sell, has allusion alone to his right of property in the patent right, as that was the only question involved in the case. The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of Congress, and no State legislation can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a State, it is subject to its laws, like other property; and such has been the uniform decision of all the courts, State and Federal, upon this question.

Chief Justice KENT, in the case of *Livingston v. Van Ingen*, 9 Johns. 581, said: "The power of Congress is only to define the right of property; it does not extend to regulating the use of it; that must be exclusively of local cognizance. If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains within the States to restrain the use of the patent right."

The 29th section of the internal revenue act of March 2d, 1867, makes it a misdemeanor punishable by fine and imprisonment to mix for sale or to sell oil made of petroleum for illuminating purposes, inflammable at less temperature or fire test than 110° Fahrenheit. Under this law Dewitt was indicted in the U. S. Circuit Court for the Eastern District of Michigan, charged with offering oil for sale in Detroit in violation of the statute. There was a demurrer to the indictment, and the judges below dividing in opinion, the case was taken to the Supreme Court, and the question there made was whether the facts charged in the indictment constituted any offense under any valid and constitutional law of the United States. Chief Justice CHASE, delivering the opinion of the court, said "that the enactment was a mere police regulation, and can only have effect where the legislative authority of Congress excludes territorially all State legislation; as, for example, in the District of Columbia. Within State limits it can have no constitutional operation." *United States v. Dewitt*, 9 Wall. 41. This construction of the power of Congress is fully sustained by all the authorities we have been able to find where the question was either directly or indirectly involved.

The right of the appellant to sell oil is not derived from the patent laws of Congress. If no patent had been issued, the right to sell this character of property would exist; and the only benefit to be derived from the patent is, that it excludes others from selling the same kind of

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oil for a limited period unless authorized to do so by the patentee, with the additional right on the part of the latter to sell and transfer his patent right in the mode prescribed by the patent laws.

The right of a State to protect its citizens from the danger attending the use of such fluids, although patented, is not inconsistent with any patent regulation nor in violation of the Federal Constitution.

Judgment affirmed.

ÆTNA INSURANCE COMPANY v. JOHNSON.

(11 Bush, 587.)

Evidence — proof beyond reasonable doubt not required in civil cases.

In an action on a policy of insurance against fire, defendant pleaded that the property was fraudulently burned by plaintiff. *Held*, that defendant was not bound to prove such defense beyond a reasonable doubt.*

ACTION on a policy of insurance against fire, issued by the defendants to Arinda Johnson and her two infant children, upon a dwelling in Consolation. During the life of the policy the property was burned and Mrs. Johnson brought this action.

Defendants answered, among other things, that the dwelling was fraudulently burned and procured to be burned by the plaintiff, Mrs. Johnson.

On the trial the court among other things instructed the jury, "That before finding a verdict against the plaintiff, A. J. Johnson, upon the ground that she fired the building or assisted or connived at its being fired, the jury should so believe beyond a reasonable doubt." The jury rendered a verdict for the plaintiff and defendant appealed.

Caldwell & Harwood, for appellant.

W. C. Bullock & A. G. Roberts, for appellees.

PRYOR, J. [After stating the facts and deciding an unimportant point.] Instruction No. 2 cannot be sustained upon principle or by the weight of authority. "It is the province of a jury in a civil case to weigh the evidence and find for the party in whose favor it preponderates. Before there can be a conviction in a criminal case they must

* See *Kane v. Hibernia Ins. Co.*, 20 Am. Rep. 409 and note; *Elliott v. Van Buren*, id. 888; *Jones v. Graves*, id. 752.

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be satisfied of the party's guilt beyond a reasonable doubt." 1 Greenleaf, 590.

In Greenleaf on Evidence, vol. 2, p. 426: "To support a special plea of justification where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him, and he would be entitled to the benefit of any reasonable doubts in the mind of the jury in the same manner as in a criminal trial."

This doctrine, applicable to a plea of justification in an action for slander, has been so enlarged by many authorities as to apply to almost every case where the prosecution of a claim in a civil action, or the defense thereto, involves in the issue a state of facts which, if proven, would subject a party to a criminal prosecution; and if sound in principle, we see no reason why the doctrine should not apply to cases where a penal prosecution might be the result of the investigation in a civil action.

It is said by many authorities that the defendant in an action for slander, by his plea of justification, where crime is imputed, assumes the burden of showing that the plaintiff has committed the offense. In order to constitute the crime, the jury must be satisfied beyond a reasonable doubt of the prisoner's guilt; for if the proof falls short of this, it cannot be said that the accused is guilty; and therefore the plea of justification must fail. Whether this is the correct doctrine is not necessary to determine.

In civil actions for torts committed, or upon contracts for the recovery of dollars and cents or the value of property, or in the defense of such actions, although facts may be alleged, that, if true, constitute guilt in the party charged, for which he might be indicted and punished, still it does not follow that the proof, in order to maintain the cause of action or defense, must be such as would convict the party charged of the crime, if upon trial under an indictment.

One may be charged in a civil action with burning a house, and its value sought to be recovered. Upon the trial proof of negligence would authorize a recovery. A wrong may be committed for which a civil action can be maintained and a recovery had, although the proof may show no willful act on the part of the accused, or even an intention to commit wrong. Hence in actions for torts, except the defense by way of justification in an action for slander, where crime is charged, the same rule applies as to the evidence authorizing a recovery as in all other civil cases. In some instances, although character may be incidentally involved by the nature of the action or defense, still it is not really made the issue; nor was it necessary, in order to find for the defendant in this

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case, that the jury should have believed the appellee guilty of any criminal offense.

In the case of *Wightman v. The Western Marine and Fire Insurance Company*, 8 Rob. (La.) 442, this doctrine is maintained: "To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson."

"If there be any class of civil cases in which such evidence might be required, it would be those where the defendant has, in a special plea of justification, fully and directly charged upon the plaintiff a crime, and where the same evidence must be adduced to support the plea as would be required upon an indictment for the like offense." *Schmidt v. New York Union Mutual Fire Insurance Company*, 1 Gray (Mass.), 534.

COLE, J., in the case of *Washington Union Insurance Company v. Wilson*, 7 Wis. 171, in discussing this question says: "Manifestly the position of a claimant in the one case and of a prisoner in the other is quite different. It appears to us that this case (the court below having given a similar instruction) is contrary to the authorities and cannot be sustained on principle."

In civil actions where the questions at issue are involved in doubt the preponderance of the evidence determines the rights of the parties, and to adjudge differently in this class of cases would be disregarding a plain elementary principle applicable to the trial of civil causes.

Judgment reversed and new trial ordered.

COMMONWEALTH V. JACKSON.

(11 Bush, 679.)

Bigamy — proof of marriage.

In a prosecution for bigamy proof of an actual marriage is not necessary; but proof that the prisoner has declared himself and has been reputed to be married will support a conviction.

INDICTMENT for bigamy. The opinion states the case.

Thos. E. Moss, Attorney-General, and *A. E. Cole*, for appellant.

Walker & Johnson, for appellee.

COFER, J. The appellee was indicted in the Lewis Circuit Court for the crime of bigamy, and was tried by a jury, and under a peremptory

instruction from the court was found not guilty, and the Attorney-General prosecutes this appeal under section 331 of the Criminal Code in order to obtain the opinion of this court upon the point decided adversely to the Commonwealth by the Circuit Court.

The only evidence of a marriage of the appellee prior to that alleged to be polygamous consisted of evidence of his declarations that another woman was his wife, and of the fact that he had lived with, recognized, introduced, and represented her as his wife.

One witness testified that appellee came to Maysville as early as September, 1874, and engaged to sell sewing machines for him; that he then said he was a married man, and that his wife was in Higginsport, in the State of Ohio; that he (witness) subsequently let the appellee have money with which he said he wanted to bring his wife from Higginsport to Maysville; that he brought a lady to Maysville, whom he introduced to witness as his wife, and boarded with her in a respectable family; that the lady gave birth to a child while in Maysville, and that the appellee told him it was his child, and that his wife had given birth to another child which died in Ohio, the funeral expenses of which the witness paid at appellee's request.

Another witness testified that two or three weeks before the alleged second marriage the appellee applied to him for a horse and buggy to take his wife to the railroad depot, saying she was going to Louisville; and a third witness swore that appellee lived with the woman that came from Higginsport, and claimed that she was his wife.

The circuit judge seems to have been of the opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses who were present at the solemnization of the marriage rites; or, in other words, that the declarations and conduct of the defendant, admitting his marriage and living with and recognizing the woman as his wife, were not sufficient to warrant the jury in finding a verdict against him.

This is a subject about which there is irreconcilable conflict in the authorities. In Massachusetts, New York, and Connecticut, and perhaps in some other States, it has been held that in prosecutions for bigamy an actual marriage of the prisoner must be proven, and that neither cohabitation, reputation, nor the confessions of the prisoner are admissible for that purpose, or, if admissible, are not of themselves sufficient to warrant conviction. *The Commonwealth v. Littlejohn*, 15 Mass. 163; *Roswell's case*, 6 Conn. 446; *The People v. Humphrey*, 7 Johns. 814.

On the other hand, it has been held in South Carolina, Virginia,

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Georgia, Alabama, Ohio, Pennsylvania, Maine, and Illinois, that in prosecutions for bigamy the confessions of the prisoner deliberately made are admissible as evidence to prove marriage in fact, and in some of those States that such confessions are of themselves sufficient to authorize the jury to convict. *Britton's case*, 4 McCord, 256; *The State v. Hilton*, 3 Rich. 434; *Warner v. The Commonwealth*, 2 Va. Cas. 95; *Cook v. The State*, 11 Ga. 53; *Cameron & Cook v. The State*, 14 Ala. 546; *Wolverton v. The State*, 16 Ohio, 173; *Murtagh's case*, 1 Ash. 272; *Forney v. Hallacher*, 8 Serg. & R. 159; *Cayford's case*, 7 Greenl. 57; *Ham's case*, 2 Fairf. (11 Me.) 391; *State v. Hodgskins*, 19 Me. 155; *Jackson v. The People*, 2 Scam. 281.

These were not all prosecutions for bigamy, but they were all cases in which the prosecution could only be made out by proof of a marriage in fact, and the same principle which would admit evidence of the admissions, confessions, or conduct of the prisoner in such of them as were not for bigamy, would also authorize its admission in prosecutions for that crime.

The American cases in which it has been held that evidence of such declarations, confessions, and conduct is not admissible, or, if admissible, is not of itself sufficient to warrant conviction, seem to rest on the authority of *Morris v. Miller*, Burr. 2057, and *Birt v. Barlow*, Douglas, 171.

These were actions for *crim. con.* in which the plaintiffs attempted to establish their marriages by giving in evidence their own declarations, and proving their recognition of and cohabitation with the women alleged to be their wives.

In the former case Lord MANSFIELD said: "There must be evidence of a marriage in fact; acknowledgment — i. e., acknowledgment of the husband by the wife — cohabitation, and reputation are not sufficient in *this action*." And he gives his reasons for so holding. "It shall not depend," said he, "upon the mere reputation of a marriage which arises from the conduct or declarations of the *plaintiff himself*." Again he says: "No inconvenience can possibly arise from this determination. But inconvenience might arise from a contrary decision which might render persons liable to actions founded on evidence made by the persons themselves who should bring the actions." And twelve years later, in deciding the case of *Birt v. Barlow*, he gave the same reasons for a like decision.

And this additional reason seems to us to be entitled to considerable weight in support of the rule announced by Lord MANSFIELD in those cases, and by this court in the case of *Kibby v. Rucker*, 1 A. K. Marsh. 391, as applicable to actions for *crim. con.* In such cases the plaintiff

knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must often be wholly ignorant of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place, as is generally the case with bigamists, in some other State or country. Another difficulty in the way of the government under the rule that the first marriage must be established by record evidence or by the testimony of one or more witnesses present at the marriage, and which does not exist in actions for *crim. con.*, is, that the government cannot read the depositions of witnesses, and may be unable to procure the attendance of those residing out of the State, while the plaintiff in *crim. con.* may procure and read depositions to prove the fact of his marriage.

But Lord MANSFIELD did not say in *Morris v. Miller*, as some have supposed, that a prisoner's words and conduct could not be given in evidence against him to prove, in a prosecution for bigamy, the fact of his having been previously married, or that such evidence would not of itself authorize a conviction. He said, it is true, that "in a prosecution for bigamy a marriage in fact must be proved;" and this we do not for a moment doubt is now and has always been the law; but Lord MANSFIELD goes on to say, "We do not at present define what may or may not be evidence of a marriage in fact," and thus left open the very question which he has been quoted as deciding, which, as already stated, seems to be the foundation upon which the American cases rest which hold that direct and positive proof is required. That Lord MANSFIELD did not mean to decide that a marriage in fact could not be proved by evidence of the declarations and conduct of the prisoner is not only clear from the case in which he has been supposed to have made that decision, but is further shown by his decision in *Mary Norwood's case*, 1 East's P. C. 337, where he, with the concurrence of Lord Chief Justice PARKER and Justices SMYTHE, BATHURST, and PARROT, determined that seven years' cohabitation and several admissions by the prisoner that a person was her husband by calling him by that appellation was not only competent, but sufficient evidence to prove a marriage in fact.

Mr. Phillips, in his work on Evidence, vol. 2, pp. 210-212, in commenting on the case of *Morris v. Miller*, says: "This decision does not warrant the conclusion that a distinct and full acknowledgment made by

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the defendant himself will not be evidence of the fact as against him, and sufficient to dispense with more formal and strict proof."

In *Truman's case*, 1 East's P. C. 470, it was decided that his conviction of bigamy obtained upon his confession of marriage was proper.

In *Cook v. The State*, Justice NESBIT, in delivering the opinion of the Supreme Court of Georgia, said: "Acknowledgments, cohabitation, repute, etc., in ordinary civil cases, prove marriage; but it is said in criminal cases, as in prosecutions for bigamy and adultery, a marriage in fact must be proved, . . . and that the admissions of the defendant are not competent. As a general rule, the confessions of a party, freely and solemnly made, are the highest evidence. So reasonable and well settled is this rule that the exceptions to it, to be sustained, ought to rest upon the most unassailable ground." And again he says it cannot be presumed that the prisoner made confessions contrary to the truth in order to shield himself from prosecution for adultery upon the assumption that he was, in fact, living in a state of adultery. "Such assumption a court has no right to make;" and we may add that, a request coming from one charged with bigamy, that the court shall assume, in order to acquit him of one crime, that he is guilty of another, and has likewise imposed a kept mistress upon society as his wife by falsely representing and introducing her as such, is not entitled to be received with any especial favor.

Mr. Justice WHITE, in delivering the opinion of the Supreme Court of Virginia in *Warner v. The Commonwealth*, said: "In all criminal prosecutions as well as civil actions the confessions of a party, his admissions, and acts amounting to confessions or admissions, are not only admissible, but often the strongest evidence against him, and not unfrequently supply the place of evidence of a higher character which would otherwise be called for;" and this is equally true in a prosecution for bigamy as in every other case. Why should it not be? Is there any thing in that crime or in its punishment which ought to give to it a distinct code of the law of evidence, or to give to those accused of it privileges not extended to those accused of other crimes?

Mr. Greenleaf says (2 Greenl. on Ev., § 49): "Any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that such relation exists; and if the defendant has seriously and solemnly admitted the marriages, it will be received as sufficient proof of the fact." If a defendant indicted for adultery can be convicted upon evidence of his admission that the woman with whom the crime was committed was the wife of another, without any other evidence of a marriage in fact, *a fortiori* one indicted for bigamy may be convicted on his deliberate admission of his own mar-

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riage, or that the alleged wife was such in fact, when that admission is coupled with evidence of recognition, cohabitation, and provision for her as a wife, and acknowledgment that he is the father of her children.

Again, Mr. Greenleaf says the marriage of one indicted for bigamy may be proved "by the deliberate admission of the prisoner himself." Greenleaf's Ev., vol. 3, § 204.

Mr. Chitty, in a note to the title "Indictments for Bigamy or Polygamy," says: "Any evidence seems to be sufficient which will convince the jury that an actual marriage was completed. Chitty's Crim. Law, 472.

In *Regina v. Upton*, 1 Car. & Kir. 165, it was held that on an indictment for bigamy or adultery the prisoner's deliberate declaration that he was married to the alleged wife was sufficient evidence of marriage.

From this notice of English and American authorities it seems to us that neither the common law of England, as adopted in this country, or the American common law, as recognized by the courts of the various States, requires us to hold that one charged with the crime of bigamy cannot be convicted upon clear and satisfactory proof of his declarations that the alleged wife is legally such when those declarations are coupled with evidence of cohabitation with her, and her introduction by him into a community where he resides as his wife. We think the safety, the happiness, and the honor of families, the good order of society, the preservation of public morals, and a due regard to public decency and individual virtue, demand that the rules of the law should furnish every facility for the punishment of crime which a proper regard for the security of the innocent will allow.

It is difficult to perceive any reason for discriminating between admissions to prove a marriage and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner and the fact that he has recognized and cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the prisoner was in fact married to the alleged wife, and unless they so believe they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which proof of actual marriage is necessary to make out his guilt upon the same legal footing with those charged with

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other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment.

We are therefore of the opinion that the court erred in giving to the jury a peremptory instruction to find the appellee not guilty.

CASES
IN THE
S U P R E M E C O U R T
OF
GEORGIA.

SMITH v. KITCHENS.

(51 Ga. 158.)

Bail — discharge of sureties by arrest of principal on bench warrant.

One charged with crime and at large on bail was arrested under a bench warrant and brought into court for trial, whence he escaped. *Held*, that the sureties on the bail bond were discharged by the arrest under the bench warrant and were not liable for the escape.

SCIRE FACIAS to forfeit a bond executed by the defendants as sureties and conditioned as follows:

“The condition of this recognizance is such that if the above bound Benjamin F. Kitchens shall personally appear at the next Superior Court to be held in and for said county of Glasscock, to be held on the third Monday in August next, to answer to such matters as shall then and there be charged against him by Joseph Kitchens, of said county, concerning the lying in ambush and attempting his life by trying to burst caps upon a loaded gun, and if he do not depart thence without leave of the court, then this recognizance to be void, else to remain in full force and virtue.”

Prior to the execution of said bond Benjamin F. Kitchens, the principal therein, was arrested and carried before a magistrate, charged with the offense of an assault with intent to commit murder. After a preliminary trial, he was admitted to bail upon giving the bond above referred to. At the next term of the Superior Court, an indictment was found against him, and he was arrested under a bench warrant. He remained in the custody of the sheriff until he escaped by walking out of the court-room while his trial was progressing. No exoneratur was entered

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upon the minutes of the court. The principal was not delivered by his sureties into the hands of the sheriff.

The aforesaid facts were set up by the sureties in response to the *scire facias*. The *scire facias* was dismissed, and the plaintiff in error excepted.

B. H. Hill & Son, for plaintiff in error.

Twiggs & Wright, for defendants.

MCCAY, J. We think the court below was right in holding these securities discharged. It would be a very bad public policy to treat the bond given by the defendant before a magistrate, as inhibiting the judge of the Superior Court, either after or before indictment, from ordering the re-arrest of the defendant. These bonds are often taken without due consideration, and ought to be subject to the reconsideration of the matter by the judge. The case quoted from Texas seems at first sight very much in point, but it will be noticed that the new process was issued by the clerk. Here, after indictment found, the judge issues a bench warrant over his own signature and seal, ordering an arrest. That arrest was made, the party was in the custody of the sheriff, and escaped. It would, as it seems to us, be an outrage to charge the original securities with this escape. He was in the lawful custody of the sheriff. The securities could not control him. He was held by the sheriff for this very crime. We are not prepared to say this second arrest was illegal. We must do that to hold these securities liable, since if it was legal the State had, by its own lawful act, taken the defendant out of the custody of the securities, to hold him for the very same offense. The course pursued in this case is the common practice in the State, and has been for many years. Especially after indictment found, the judge of the court where the indictment is, orders the re-arrest of one under bail, at his discretion. As we have said, it is a very proper thing often for the judge to do, and if such a power did not exist, it would be a great defect in our criminal law.

Judgment affirmed.

Atlanta National Bank v. Douglass.

ATLANTA NATIONAL BANK v. DOUGLASS.

(51 Ga. 205.)

Surety — discharge by acts of obligee.

Defendant indorsed a note for the accommodation of the maker, who also gave the payee a mortgage as further security pursuant to an agreement between all the parties. The payee failed to have the mortgage recorded and afterward canceled it and took another. *Held*, that defendant was discharged, and this even though the original mortgage would have been worthless if recorded, by reason of prior liens.

ACTIONS on certain promissory notes against Douglass, as indorser, and one Wise, as maker. Said Wise being indebted to the plaintiff and a suit thereon having been brought, the notes in question were given in settlement of the case, the defendant indorsing them, upon the agreement among the parties that a mortgage on Wise's stock of goods should be given to plaintiff as further security. The mortgage was duly executed and delivered, but Wise neglected to have it recorded, and three months after, without defendant's knowledge, he canceled it and took a new one in its place.

The other facts appear from the opinion. The verdict was for the plaintiff.

Sidney Dell & W. O. Tuggle, for plaintiff in error.

Speer & Speer, for defendant.

MCCAY, J. There is no real dispute between the parties as to the material facts upon which arises the legal question made in the record. Both sides agree that it was part of the agreement, at the time these notes were taken, that a mortgage should be executed by Wise to the plaintiff upon his (Wise's) stock of goods. The plaintiff's witness insists that this was a mere favor by him to the security, while the security insists that it was a *sine qua non* for his action, and that he would not have agreed to the arrangement at all except for this agreement. We do not think the difference is material. The fact is undisputed that a suit was pending in favor of the bank against the defendants, the one as principal and the other as security; that it was agreed that the suit should be dismissed; that the present notes, each for \$100, should be given in lieu of the old debt, and that Wise, the principal, should give the mortgage. The giving of the mortgage was a part of the contract at the time the

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notes were taken, just as truly whether it was agreed to as a favor to Douglass, or whether Douglass made it a condition on which he agreed to the new arrangement. At least, the contract, if stated truly, was that the pending suit should be dismissed, that the notes now sued on (upon which Douglass is, in terms, only security) should be taken in lieu of the old debt and that a mortgage should be executed by Wise to the plaintiff on his stock to secure the debt. This mortgage was in fact executed and the plaintiff put in possession of it. He not only failed to record it, but gave it up to Wise without the knowledge and consent of Douglass and took another to suit himself. We think under the provisions of the Code this was a discharge of the indorser, and that under the facts of the case the charge of the judge was right. Section 2154 of the Code provides "that any act of the creditor which injures the surety, exposes him to greater liability or increases his risk will discharge him."

2. It is contended in this case that as there was evidence going to show that the surety was not in fact hurt by this act of the plaintiff, the judge should have charged the jury that the surety was not discharged if he was not injured, or at any rate, that he was only discharged *pro rata*, according to the amount of injury. But the Code very certainly means more than this; it does not stop at the words "injures the security," it adds, "increases his risk or exposes him to greater liability." It is insisted, however, that as the Code only purports to be a re-enactment of the old law, that these broad words are to be qualified by the settled rules as existing previously to the codification, and we admit that there is much good sense in this view of the meaning of this section. Ordinarily, if a creditor gets new security and loses it by his *laches* or fault, the security is only discharged *pro tanto*, and only if he be actually damaged, and this upon the common-sense principle that the amount of his real hurt ought, in justice, to be the measure of his redress — no more, no less. At first sight, the case of *Toomer v. Dickerson*, 37 Ga. 428, would seem to militate against this rule, and it was so insisted at the hearing of the case at bar. But in that case, as in this, the mortgage was part of the original contract, and the fact that it was made, was one of the considerations inducing the security to act, to make the contract of securityship. It was not a case of a subsequent security as a new collateral, etc. When the additional security is part of the original contract, the surety has a right to stand on its terms. The failure of the principal to record, the loss of the lien, in this case the destruction of the mortgage, is a change in the terms of the security's undertaking. He only guarantees the notes as secured by the mortgage, and, when the mortgage was destroyed, his contract was no longer existent; its terms were broken. The contract

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that he entered into was altered. The amount of that alteration and the effect of it is immaterial. Even if his risk was lessened by it he is discharged. *Bethune v. Dozier*, 10 Ga. 235.

Judgment affirmed.

BUCK v. COLLINS.

(51 Ga. 391.)

Registry of deeds — right of citizens to inspect.

By statute all books kept by any public officer were subject to the inspection of all citizens, and when the officer's aid was required on such inspection he was entitled to a fee. *Held*, that no one was entitled without payment to examine the public record of deeds to make abstracts of such records for publication.

ACTION for an injunction to restrain the defendant, the register of deeds of Fulton county, from obstructing complainants or their agents from inspecting the records of deeds of said county.

The complainants were engaged in making an abstract of titles to the property in said county, for publication, and in pursuance thereof inspected the records in defendant's office. Such inspection was made during office hours and, as complainants alleged, without interfering with the duties or rights of said defendant or any other person, and without damage to the records.

The defendant, however, refused complainants the use of the records, and claimed to be entitled to the fee provided by the statute cited in the opinion.

The injunction was refused, and complainants excepted.

E. N. Broyles, for plaintiffs in error.

Candler & Thomson, for defendant.

MCCAY, J. The complainant claims to have the legal right to go into the office of the clerk of the Superior Court (who is also the recorder of deeds and mortgages), and make from the books an abstract of them; and as he does not need any aid of the clerk in making this abstract he insists that he is entitled to do it without the payment of any fees. This right is claimed, not only on general principles, but it is said exists by positive law. Section 14 of the Code declares that all books kept by any public officer shall be subject to the inspection of all citizens of this

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State, within office hours, every day except Sunday. The fee bill (Code, § 8695) provides fees for inspection and abstract as follows :

For each inspection, when the clerk's aid is required, twenty-five cents ; for examination of books and abstract of result, \$100.

Under these laws, the complainant insists that he has a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, copy from the books, when they are not in use, at his option, and thus collect material for a book which he proposes to publish for sale. As he is able, by employing an expert, to do this inspection and compilation himself, without the assistance of the clerk, he insists that no fee is required, and as the clerk refuses to permit him to go on with his enterprise, except upon the payment of a fee for each separate investigation of a title, he prays that the clerk may be enjoined. We agree with Judge HOPKINS. We think the complainant has no such right as he insists upon.

In the first place, we doubt if the avowed object of the complainant is not a perversion of the purpose for which the books are kept. The necessities of society and the protection of those dealing with property require that these records shall exist. That the title to land, the fact that mortgages or judgments exist, shall be capable of being inquired into by those interested. This is, as we have said, a necessity of society, and this necessity begets the necessity for books and records. The character of one's title, and whether one has mortgages or judgments against him, is thus of *necessity* open to inquiry, and the public, by providing books and records, meets this necessity. Men are required, for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, what they may have strong inducements to keep secret. But while the public interest thus provides a mode by which any one may learn the truth upon *inquiry*, it is no part of the public scheme to make this exposure universal. It provides that those who seek the information can get it, but it does not and ought not to flaunt the information its records contain before the public gaze, and thus make a scandal of a public necessity. The object of the record is to furnish to those *needing* it the information the record contains. That object is attained when its books are open to inquiries as these occasions present themselves. The object sought by the complainant, to-wit: to put the substance of these records into print, to be sold and put in the hands of any one who may chance to buy or to borrow, is an extension of this publicity beyond the necessities which make the record justifiable, and is a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze.

them without the clerk's aid, to have the custody of the books and papers of his office. The clerk cannot charge a fee for a mere inspection, where his aid is not required. But no person has a right to examine or inspect the records of his office, except in his, the clerk's, presence and under his observation. If he may do this for a minute, the clerk is not "keeping them safely and securely." A blot or a scratch may be made in a minute that may alter a record; a leaf may be abstracted in a minute, and if one man may of right take a record book and "abstract" its contents — work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and if this may be done, except under the clerk's immediate inspection, no record can be kept safely. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, and from day to day, until his book is finished. He has the right to the services of the public officer for months together without pay; for not only the law but every principle of propriety requires that no person shall inspect the books, except under the watchful observation of the clerk.

It is a perversion of the right of inspection, evidently intended to provide for examinations from time to time, as the ordinary occasions and

But again, the claim of the complainant to inspect and make abstracts of the clerk's books without the payment of fees, as he proposes to do, is not fairly within that part of the fee bill, which, by implication, permits any citizen to make an inspection without fee if he does not require the clerk's aid. Code, § 3695. All laws are to be reasonably construed in view of the object of them, and in view of other laws. The object of this permission to *inspect*, without fee, if no *aid* is required from the clerk, is plain. It is contemplated that lawyers, public officers and persons familiar with the books, by having frequent occasion to use them, may not need the clerk's assistance for the purpose. And, by implication, this permission contemplates that the clerk shall in such cases make no charge for simply standing by and noticing that no improper interference with the records is had. But there is nothing in this implication (and that is all it is at best) which authorizes the clerk to permit even an inspection except in his own presence, or in the presence of his sworn deputy. He is required (§ 267, Code) to "keep all books, papers and dockets belonging to his office with care and security." He *cannot* do this if any person may handle or inspect them otherwise than under his own eye. In our judgment any clerk would be guilty of a failure in his official duties should he permit any person, if only for a minute, though he might be familiar with the books, and be able to examine

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business of men may require, to make a business of it. The law might well, in view of the ordinary wants of the people, permit an inspection of the books, when no aid is required from the clerk, without a fee. It is but a slight hindrance to him in his duties to keep his eye on the few citizens who visit his office for such purposes, and if he has only to stand by as a sentinel to prevent fraud or spoliation, for a minute or two, it is but a small matter, and may well be without a fee. But the law never contemplated that any one would make a business of it; spend days and weeks in the office, engaged in an occupation which, in our judgment, cannot lawfully be carried on except under the immediate observation of the clerk. Fees are given for *each* inspection, *each* abstract. The law has in view the inspection of one chain of title — the *status* of one man — and fixes a fee for that. If the inspection of the book does not require the aid of the clerk, he can demand no fee, but it is still his duty to inspect the inspector. In our judgment the rights claimed by the complainant thus to occupy the attention of a public officer, perhaps for weeks together, without fee or reward, is a perversion of the letter of the law, intended for one purpose, to another and different purpose not contemplated by the law-makers, and contrary to their intent. It stands exactly on the footing of the misconstruction mentioned by Blackstone, when it was concluded that because it was unlawful to draw blood in the streets, a surgeon was a law-breaker who bled a man found helpless therein. If some one familiar with the clerk's office, say an old clerk or a lawyer, whose business required him often to examine the books, were to make a business of it, and sitting at the clerk's door solicit every inquirer to give him the job, he would be no more a perverter of the law and infringer on the rights of the clerk than this complainant proposes to be.

The avowed object of the complainant is to furnish to the public the contents of the books and papers of the clerk's office for his own profit. He proposes to say to the public, if you desire to inquire into a title or into the incumbrances upon an estate, or into the judgments against a citizen, you need not visit the clerk's office, you need not pay him any fees. Here is my book — it is all there; you can get what you want without fees.

Our law gives the clerk no special fees for keeping safely the books, etc.; the pay he gets for this service — this duty — to be always on hand watching his books and keeping them ready of access, is the fees which, in the ordinary course of business, he will receive for inspections, abstracts, etc. The scheme of the complainant strikes at the very root of this lawful perquisite of the clerk and takes away from him those fees

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which the law contemplates he will receive for the performance of a duty cast upon him.

Upon the whole, therefore, we think the judge was right in refusing the injunction. The plaintiff's whole scheme is of doubtful propriety, proposing, as it does, to make unnecessarily public men's private affairs, which the law, for the purposes of fairness, requires them to put upon record where citizens may, as their necessities require, examine. It proposes to use a privilege, intended only for special cases, in such a way as to put an onerous and exacting duty upon the clerk without remuneration, and to take away from him, as far as it is possible for the scheme to do it, the lawful perquisites of his office.

Judgment affirmed.

 BRIESWICK V. MAYOR, ETC., OF BRUNSWICK.

(51 Ga. 639.)

Municipal corporations — by-laws — infraction of.

A municipal corporation was authorized by its charter to make by-laws and punish their infraction by fine or imprisonment. *Held*, that this did not authorize imprisonment for non-payment of a fine imposed by a by-law.

HABEAS CORPUS. The opinion states the case.

W. Williams, R. L. Joice and M. L. Mershon, for plaintiffs in error.

S. C. DeBruhl, by *S. D. McConnell*, for defendant.

WARNER, C. J. It appears from the record and bill of exceptions in this case, that Robert Brieswick and Cyrus Shelton, two boys under 14 years of age, were imprisoned in the guard-house of the city of Brunswick; that they were brought before the judge of the Superior Court on a writ of *habeas corpus*, on the allegation in their petition therefor, that their imprisonment was illegal. The court, after examining into the cause of their capture and detention, on the return of the *habeas corpus*, discharged them from the custody of the officer who had them in charge. They were again arrested and imprisoned in the guard-house of said city, and again brought before the judge of the Superior Court on a second writ of *habeas corpus*, on the return of which it appeared by the answer

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of the guard-house keeper, that he detained them in custody by virtue of a warrant of commitment issued by the mayor of said city, dated the 4th of June, 1873; the order of discharge for the same alleged offense being dated 23d of May, 1873. The warrant of commitment recited that the defendants had been found guilty on the 23d day of May, 1873, of violating an ordinance of the city "to prevent persons from indecently exposing themselves or others," and sentenced to pay a fine of \$5, or in default thereof to be confined in the guard-house ten days, and each having failed and refused to pay said fine, respectively; and whereas, the said Shelton and Brieswick have been confined by you in said guard-house for the space of three days; these are therefore to command you to secure the bodies of the said Shelton and Brieswick and keep them, and each of them, in the guard-house seven days from the date of their reception. There does not appear to have been any warrant issued for their arrest, founded on the affidavit of any person, but simply a notice served upon them, signed by the city marshal, requiring them to appear before the police court, stating that they were charged with the offense of "bathing at a wharf known as the Cotton Press." On hearing the second *habeas corpus* the court refused to discharge them, and remanded them to be imprisoned; whereupon the defendants excepted. [The court then commented on the method of procedure.]

1. But we place our judgment in this case on the ground that the imprisonment of the boys was illegal, because the police court of the city of Brunswick had no power or authority conferred upon it by its charter to coerce the payment of the fine imposed by imprisonment. The act of 27th August, 1872, consolidating and amending the several acts incorporating the city of Brunswick, provides, by the 38th section thereof, that the police court shall have cognizance of all offenses against the ordinances, by-laws, rules and regulations of said city, and the laws of this State touching said city, with power to inflict the proper punishment by fines, imprisonment, labor, or other penalty prescribed by such ordinances, by-laws, rules and regulations, from time to time, and to enforce the same by *mittimus*, directed to the chief marshal of the city, or any lawful constable thereof, or to the keeper of the guard-house, when necessary. The police court of the city, under its charter, had the power and authority to have inflicted punishment by imposing the fine prescribed by the ordinance for its violation, but did not have the power and authority to coerce the payment of such fine by the imprisonment of the party or parties on whom such fine was imposed. The city council have the power, under its charter, to prescribe the punishment for a violation of the ordinances of the city, either by fine or imprisonment. When the

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punishment inflicted is imprisonment, that is the penalty to be enforced. When the penalty is a fine, that is the penalty to be enforced in the manner provided by law; but the charter does not confer upon the city council of Brunswick the power and authority to pass an ordinance to enforce the collection of a fine by imprisoning the party who fails to pay it until he shall do so, or for any specified number of days until he shall do so. The city council have the power and authority to pass an ordinance inflicting the proper punishment by imprisonment for a violation of its ordinances, but have not the power and authority, under its charter, to pass an ordinance to enforce the collection of a fine by imprisonment, or to imprison any person for the *non-payment of a fine* imposed on him.

Inasmuch as it appears on the face of the record that the two boys were imprisoned because they did not pay the fine of \$5 imposed on them, respectively, their imprisonment was illegal, and the court erred in not discharging them.

Let the judgment of the court below be reversed.

HARRIS V. TISEREAU.

(52 Ga. 153.)

Equity — lost will — jurisdiction.

BILL in equity against an executor alleging that defendant's testatrix had unlawfully destroyed the will of R., of whom she was the sole heir and which will gave her a life estate only in R.'s property, remainder to plaintiff; that the witnesses to the said will were dead, and that by reason of the destruction plaintiff could not set out a copy of the said will. Prayer that defendant might be decreed to hold the property in trust for plaintiff. *Held*, on demurrer, that the bill was sustainable without proof of the lost will in the Probate Court.

BILL in equity, by Tisereau and others, alleging as follows:

That Berry Rogers died in April, 1866, without issue, leaving surviving him his wife, Jane Rogers, and that said Amanda Tisereau and Samuel B. Peacock were children of his sister, and his next of kin by consanguinity; that he left a large estate, consisting of lands, money, etc., which he had owned in his own right; that a short time before his death he, being of sound and disposing mind, executed, in due form of law, a legal and valid will, of which a copy could not be attached for reasons hereinafter stated; that from their information and belief, such will,

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after the introductory or formal part, contained, in substance, the following items, limitations and bequests :

Item.—I give to my wife, Jane Rogers, a life estate in all my property, both real and personal. This provision to be in lieu of dower.

Item.—It is my will and desire that at the death of my said wife my negro property shall go to and belong to — Small, to whom I have already given \$—— with which to buy a plantation.

Item.—To my friend, Peter Harris, I give the sum of \$2,500.

Item.—I give and bequeath to my nephew, Samuel B. Peacock, and to my niece, Amanda M. Tisereau, formerly Amanda M. Peacock the children of my deceased sister, Mary Peacock, all the remainder of my property, both real and personal, of whatever it may consist, subject to the life estate of my said wife. At the death of my said wife the whole of said property shall be equally divided between my said nephew, Samuel B. Peacock, and my said niece, Amanda M. Tisereau, share and share alike.

That they were informed and believed that such will was duly signed by said Berry Rogers, in presence of three competent witnesses, who signed the same as such in presence of said testator and of each other, such witnesses being, to the best of their information and belief, F. W. Brantly, A. F. Sherwood, and Daniel Clark, all of whom died prior to the death of said Jane Rogers ; that they were advised and believed, and so stated, that said Berry Rogers had said will in his house at the time of his death, and said Jane Rogers, knowing of and having access to it, at once, upon his death, stealthily took possession of and destroyed it ; that in this she was aided and assisted by certain of her own blood relations, who were present and cognizant of the existence and contents of the will, who acted in order to secure to themselves a benefit from the estate ; that said Mrs. Rogers, urged on by their influence, was actuated not only by a desire to defraud complainants, but also by the hope of enlarging her life estate into a fee under the pretended intestacy of her said husband, and would thus be enabled to dispose of the estate according to her own will and pleasure ; that in pursuance of such scheme she took possession of the whole estate as in her own right, and undertook to dispose of the same by her own will, making her own relations by consanguinity and strangers in blood to said Berry, the beneficiaries thereunder ; that during the whole time said Jane Rogers observed the most profound silence and practiced the most deceptive conduct in reference to the will of said Berry, until a short time before her death, when, in a moment of contrition, she disclosed the fact of the destruction of such will under the influence of her relations ; that by reason of such destruction, the secrecy

observed, the death of the witnesses to the will of said Berry, and their recent knowledge of the facts, they were unable to make out such a copy of the will as a court of ordinary could set up and establish; that the fraudulent conduct of said Jane Rogers constituted her a trustee for them, and charged her with the custody of the property for their use and benefit; that Jane Rogers died on the — day of April, 1871, and that thereupon the defendant, the executor nominated in her will, after qualifying thereunder, took possession of the estate, and was receiving rents of the yearly value of \$10,000; that he had paid out large sums to strangers in blood of said Berry Rogers, and that he was proceeding to dispose of and distribute the whole estate, and had advertised all the property for sale, as executor, under the provisions of her will.

The bill further charged various acts of waste and mismanagement of the executor, not material to the issue before this court; that he was a man of but small means, and was incapable of successfully taking charge of the estate; that complainants were without adequate remedy at law, but could only have such relief in a court of equity.

The prayer was for an injunction against said defendant's selling or exercising control over said property; for the appointment of a receiver to take charge of the property; for a decree that the estate in the hands of said defendant, as executor, which had been so held by Jane Rogers in trust for complainants, under the will of Berry Rogers, might be turned over to complainants to be divided between them, and for general relief.

The defendant demurred to the bill. The demurrer was overruled, and defendant excepted.

Whittle & Gustin and R. F. Lyon, for plaintiff in error.

Poe & Hall and C. B. Wooten, for defendants.

MCCAY, J. 1. The question whether, in any case, a court of chancery in this State can entertain jurisdiction of the probate of a will, is a new one, and deserves serious consideration, though it is not, in our judgment, necessarily involved in the record. It is contended that the language of the Constitution of 1868 takes away this jurisdiction, if it ever existed. The argument insisted on is as follows: The Constitution of 1798 declares that the Superior Court "shall have concurrent jurisdiction in all other civil cases:" Constitution 1798, art. 3, § 1. In section 6, of the same article, the powers of a court of ordinary, or register of probates, are in general terms conferred on "the justices of the inferior court." The Constitution of 1861, after giving certain exclusive jurisdiction to the

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Superior Court, among which is exclusive jurisdiction in equity cases, gives concurrent jurisdiction to that court in all other civil cases. In another section probate jurisdiction is given to the ordinary, and an appeal allowed to the Superior Court: Constitution 1861, art. 4, § 2, paragraphs 5 and 9, and section 3, paragraph 5. The Constitution of 1868, after providing for certain exclusive jurisdiction, including equity cases in the Superior Court, gives the Superior Court jurisdiction in all other civil cases, "except as hereinafter provided:" Article 4, § 2, paragraphs 5 and 9. Thereafter, to wit, in section 3, of article 4, the powers of a court of ordinary are given to the ordinary, with an appeal to the Superior Court. The argument is, that by providing an appeal from the ordinary to the Superior Court, and by conferring jurisdiction on the ordinary of probate cases, after the words "except as hereinafter provided," it is meant to be declared that the jurisdiction of the ordinary is declared to be positively exclusive, so that under no circumstances can the Superior Court have jurisdiction, except by appeal, of any probate of a will. It is admitted that previously to 1861, the Constitution was at least open, as this court intimated in *Slade v. Street*, 27 Ga. 17, to such a construction as gave the Superior Court such jurisdiction, as a court of equity, as the Court of Chancery had in England. But it is said that under the Constitution of 1868, especially taking into account section 331 of the Code, which in terms declares the probate jurisdiction to be exclusive in the ordinary, even the jurisdiction which was formerly in the Superior Court, as a court of equity, is taken away. But we think the words, except as hereinafter provided, mean no such thing as this. Were there no positive denial of jurisdiction, thereafter, perhaps the words would bear the meaning put upon them, but the Constitution of 1868 positively denied jurisdiction to the Superior Court over certain debts and over the homestead. These words, "except," etc., it will be noticed, are added to the clause giving jurisdiction to justices' courts, and to the clause conferring equity powers upon the Superior Court, and are evidently qualifications upon the jurisdiction of all courts, in view of the positive denial of jurisdiction contained in the homestead and relief clauses referred to. It seems to us that this is the most natural meaning put upon these words under the circumstances, and that to construe them as referring to the provision made afterward, for a Probate Court, is strained and unnatural.

2. But the jurisdiction of the ordinary over the probate of wills, appointing administrators and executors, and generally of matters pertaining to intestate and testate estates, is, and always has been in this State, exclusive. This is the positive provision of the Code, section 331, and has been the constant practice and ruling of the courts from time imme-

morial. But what is meant by the exclusive jurisdiction of the ordinary in such cases? Does it mean any more than is meant by exclusive jurisdiction in the Superior Court to try titles to land, or in the inferior court to lay out or close up roads, or exclusive jurisdiction in land courts to decide a question of head-rights? If a case arise involving any of these questions, in which there is also fraud, accident or mistake, or any of those complications which call for the interference of equity, jurisdiction arises in a court of equity, notwithstanding the exclusive jurisdiction of the other courts. A court of equity is "for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done." Code, § 3081. And if a case arise presenting those features which authorize equitable interference, the fact that some other court has ordinarily exclusive jurisdiction of the principal subject-matter is no hindrance to the equitable jurisdiction. A court of equity will, under proper circumstances, grant a new trial from a verdict at law, or before any court. Code, § 3129. And our Code, as to questions of fraud, broadly declares that equity has concurrent jurisdiction with courts of law in all cases of fraud, except fraud in the *execution* of a will Code, § 3172. These provisions of our Code are but a succinct statement of the chancery jurisdiction in England. Its fundamental idea is, that it undertakes to supply the lack of other courts in granting relief, where a right sufficiently perfect for redress by courts, is either not recognized by other courts, or by reason of their defective machinery cannot be fully protected and administered. Haynes' *Outlines of Equity*, 28, 27; *Law Library*, vol. 98. There was under the old system of England no mode by which a will of real estate could be probated and recorded once for all. It was considered a muniment of title, and was required to be proven, and might be attacked whenever it was offered in evidence before a court. The Probate Court, if the will was a will of personalty as well as of realty, might probate it. But the probate was not noticed by the common-law courts. This was a serious defect in English jurisprudence; and to remedy this, the Courts of Chancery in England will entertain a bill to *establish* a will of realty in favor of the devisee against the heir. The court does this under its jurisdiction to quiet titles and perpetuate testimony. But that is almost a probate, since, if it be established against the heir, the judgment binds his heirs and privies. *Lovell on Wills*, 416, 417; 1 *Madd. Chan.* 253; *Boysse v. Bosborough*, 6 H. of L. Cas. 3, where the subject is fully discussed.

As to wills of personal property, this defect in the English system did not exist, and there was no call for chancery to remedy it. Probate of

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a will of personalty against the world, and once for all, was made in the Ecclesiastical Court. It was of the utmost importance to society that this should be done. The death of the owner of personal estate devoted his personalty of every description to his debts, his legatees and distributees. It was, therefore, necessary that it should forthwith appear whether his personal property should be distributed or go to legatees, and that his debts should be paid before it went to either. Some mode, therefore, of settling once for all whether there was a will, was a necessity of society. This, for certain reasons which are part of the history of England, fell to the Ecclesiastical Courts, and was performed in all its details by those courts under rules as wide and as little cramped by common law narrowness as were the proceedings of equity courts. That there was a will, or that there was not, was inquired into, its precise terms were ascertained, it was spread upon a book for the registry of wills, and the court undertook the superintendence of its execution. In the doing of this it exercised powers and followed methods unknown to the common law, derived from the same source, the civil law, as the powers and methods of the Court of Chancery. It established lost, mutilated or destroyed wills; it set aside its own judgments, and allowed rehearings and reviews for good cause, and examined questions of fraud, accident and mistake as keenly and searchingly as did a Court of Chancery. Under such a system even the broad jurisdiction of chancery over fraud might well be considered unnecessary in matters within the scope of the powers of the Probate Court. And long since it has been settled that fraud in the procurement of a will is not within the jurisdiction of a court of equity. Whether there be or be not fraud is one of the issues settled by the probate. If there be fraud, it is no will. If the will be set up, the judgment settles the matter. And if the application to chancery be before judgment, the reply is that the Ecclesiastical Court is competent to settle it. And though at one time equity would interfere to redress fraud in the *probate* as it would fraud in a common-law trial, by acting personally on the parties and compelling them to go into the Probate Court and do rightly, yet, in England, that jurisdiction has rarely been exercised, and may now be said to be abandoned, the power of the Probate Court to grant new trial, to search the conscience of the parties and to punish for contempt, being ample and complete. See the cases collected and the subjects discussed in *Perry on Trusts*, § 182. But both in this country and in England this limitation of the jurisdiction of chancery over frauds has not extended so far as to deny the jurisdiction where a will has been *fraudulently destroyed*. In *Tucker v. Phipps*, 3 Atk. 359, Lord HARDWICK asserts the jurisdiction in the very broadest terms.

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The case goes upon the general jurisdiction of equity over frauds, and recognizes the right of the legatee to come into equity against the spoliator, to enforce against him the bequest of a trust. A distinction is taken between the general probate of the will which properly pertains to the Ecclesiastical Court, and enforcing the title or right of the legatee, and the chancellor says, that as against the spoliator, the court would not put the legatee to the hardship of establishing the words of the will against the world by probate before the Ecclesiastical Court. And so far as I can find there is no decision of a case in England contrary to this. In *Dalston v. Coatsworth*, 1 P. Williams, 731, which was for relief against the fraudulent suppression of a deed, two cases are cited by the chancellor where the court decreed the spoliator of a will to hold the bequest in trust for the legatee, though there was no probate of the will; and in *Haines v. Haines*, 2 Vern. 441, the same question was made and decided.

In this country there is a conflict in the decisions. In Ohio, 15 Ohio, 345, it is held that the will must first be set up in the Probate Court. And this would seem to be the rule in Louisiana. *Gaines v. Chew*, 2 How. 619, and *Gaines v. Hennen*, 24 id. 558. Perhaps also in Massachusetts, 12 Allen, 1. But in *Bailey v. Styles*, 1 Green's Chan. (N. J.) 220; *Allison v. Allison*, 7 Dana (Ky.), 90; in 1 Bay (S. C.), 464; *Meade v. Langdon*, 22 Vt. 59, and in *Buchanan v. Matock*, 8 Humph. (Tenn.) 390, the doctrine of Lord HARDWICK, in *Tucker v. Phipps*, is fully recognized and acted on. Our own court, in *Slade v. Street*, 27 Ga. 17, whilst this particular question was not the point of the case, distinctly recognize the same doctrine; and is there not great significance in the broad language of the Code, § 3172, that equity has concurrent jurisdiction with all other courts in questions of fraud, except fraud in *the execution* of a will. It cannot be doubted but that if a will be duly made and executed, and the testator die, leaving it as his will, and it be fraudulently suppressed, that some court has power to correct the wrong. If the Probate Court has the power, and in certain cases it clearly has, section 2481, Code, then the express words of section 3272 gives chancery concurrent jurisdiction.

In the case made by this bill, to wit: one where a will duly executed has been destroyed after the testator's death and the witnesses are all dead, we have doubts if the Probate Court has, in this State, jurisdiction. Section 2931 of the Code implies that the Probate Court can only set up a lost or destroyed will if the witnesses be living. Unless this is to be taken as a repeal of the well-settled rule that such a will may be set up on proper proof then chancery alone has jurisdiction. In England, it is clear that a will duly executed and destroyed after the death of the tes-

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tator may be set up, though all the witnesses be dead, if clear proof be made that such a will did in fact exist. 1 Hagg. 115; 2 Lee, 22; 1 Adams, 462; and this is the general ruling in the courts of this country. See the doctrine discussed in 2 Redfield on Wills, 6, 11.

The statutes providing for the due execution of wills, while they provide in detail how they shall be signed and attested, made no provision as to how they shall be proven to have been so signed and attested. And the courts have adopted the rules of evidence usually enforced to prove facts in the courts. If the subscribing witnesses be within the power of the court they must be called. If they be dead, insane, or out of the jurisdiction, the next best evidence is the resort to proof of handwriting. If the will be lost, the witnesses must be produced, if accessible; if not the next best evidence is to be used. It is not meant by this rule that any thing but *evidence* is to be used. And there are many cases where the courts have refused the probate because the proof has not come up to the rule, which is well settled that the proof in such cases must be clear and satisfactory. See a discussion of the whole subject with the cases. 1 Redfield on Wills, 348, 349. Such being the general rules of law, we do not think that section 2481 of the Code was intended to deprive any court of the right to set up a lost will where the witnesses are dead, but only the court of ordinary, and it does that only by implication. Cases may be presented where the proof would be so clear as that it would be shocking to refuse redress, and where it would be not only a temptation to crime but a premium upon it to refuse.

3. As this case comes before us at present, the due execution of the will and its destruction by the only heir, the defendant's intestate, is admitted, and our present decision is only that on the demurrer there is equity in the bill. Whether the facts charged are proven, may arise when the case is tried. We only say now that the law requires a satisfactory case to be made out. Whether that is done must depend always on the facts of each case.

Judgment affirmed.

MARKHAM v. O'CONNOR.

(52 Ga. 183.)

Estoppel — of mortgages by declarations made in his presence.

Land on which was a mortgage duly recorded, was sold at auction in the presence of the mortgagee. The auctioneer announced that the land was unincumbered and the

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mortgagee failing to correct the announcement, the purchaser bought it under the impression that he was getting a clear title. *Held*, that the mortgagee was estopped from afterward setting up his mortgage as against the purchaser.

BILL in equity by O'Connor to restrain Markham and another from selling certain lands under a mortgage foreclosure.

The bill alleged that one Holmes Sells owned certain real estate in the city of Atlanta, upon which defendant, Markham, had a mortgage which was duly recorded; that in September, 1866, Sells caused said property to be sold at public auction; that plaintiff, O'Connor, bought part of said property; that at such auction sale said Sells caused the auctioneer to announce that the said property was unincumbered; that said Markham was present and heard such announcement; that said Markham failed to give information that he held a mortgage on said property, and that plaintiff purchased and paid for said property under the impression induced by the declaration of the auctioneer that the title was clear. The bill further alleged that Markham had proceeded to foreclose his mortgage; that the property was about to be sold.

The answer denied that defendant made any announcement by the auctioneer that the property was unincumbered.

At the trial the jury returned a verdict perpetually enjoining the collection of the mortgage, and a new trial being refused, defendant excepted.

B. H. Hill & Son and Julius & Brown, for plaintiff in error.

L. J. Gartrell, Collier, Mynatt & Collier and Jackson & Clarke, for defendant.

MCCAY, J. 1. So far as this case turns on the evidence, we do not, under the rule we have so often announced, undertake to pass upon it. The statements of the witnesses are conflicting, and it is the province of the jury to determine between them. That the weight of the proof may be against the verdict does not, if the judge below has refused, justify this court in disturbing it. There is a good deal of evidence supporting the verdict, and if the charge was right, and the refusal to charge as requested, proper, the verdict ought to stand. The charge, as given, was in substance as follows: That if Markham was present at the sale, if it was announced by the auctioneer that the title was perfect, and clear or unincumbered, and he (Markham) failed to make any correction of said announcement, and O'Connor bought under the impression that he was getting an unincumbered title, and took a deed, and paid his money under such impression, Markham is estopped from setting up his mort-

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gage as to O'Connor, even though the mortgage was duly recorded at the time of the sale. Was this charge right? Very certainly, there was evidence to support it. Several of the witnesses testify almost in the words of the charge as to the character of the announcement, and though others do not give exactly the same version of it, yet if there was any evidence putting the terms of the announcement as strong as it is put in the charge, that will justify the charge. The whole charge is not set forth in the record, but we must assume that all of it that is claimed to be error is here. We assume, therefore, that the judge told the jury that the converse of the proposition stated was true. That if the facts proven failed to come up to the charge in any of the particulars stated, as to the presence of Markham, as to the character of the announcement, as to his failure to correct it, and as to the belief and action of the purchaser, then Markham would not be estopped. At last, therefore, the legal question in the charge resolves itself into this: Is a mortgagee, who has his mortgage duly recorded, if he stand by at a public sale of the property, hear a public announcement that the purchaser will get an unincumbered title, and say nothing, estopped from setting up his mortgage against one who buys at such sale, and pays his money under the impression that he is getting a good and unincumbered title? Our Code, in express terms, defines constructive fraud to consist in any act of *omission* or commission, contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience, and operates to the injury of another. The last clause of the section adds, that the latter — constructive fraud — may be consistent with innocence: Code, § 3173. The only difference between this case and the case of *Markham v. Hunnicutt*, 43 Ga., is that then Markham *said* it was good property. *That* was an act of commission; this is an act of omission. Section 2966 of the Code puts acts of omission, where it is one's duty to interfere, on the same footing as acts of commission. It is in these words: "A fraud may be committed by acts as well as words; and one who *silently* stands by and permits another to buy his property without disclosing his title is guilty of such a fraud as estops him from subsequently setting up such title against such purchaser." This section of the Code is not only a condensed exposition of the law as it exists, but is the deduction of enlightened reason and justice, upon the facts supposed. Nobody would for a moment hesitate to say that if A, being about to buy an estate, should inquire of B whether it was unincumbered, and B should reply that it was, that B would be estopped ever afterward to set up an incumbrance to the injury of A. Nor is the estoppel less strong on principles of justice and equity, if the fact be that B stand

by and say nothing, when another, in his presence and hearing, asserts that property about to be sold is the property of the seller. The case, then, is within that other familiar rule of evidence, as expressed by the Code, § 3790, that "acquiescence or silence, when the circumstances require an answer or denial, or other conduct, may amount to an admission" — a principle founded in common sense and common honesty, and administered day by day in courts of justice, not only in settling questions of property, but in deciding upon matters involving liberty and life. Was it Mr. Markham's "legal or equitable" duty to have spoken, under the circumstances and announcements put by the judge, and as detailed by at least *some* of the witnesses? Was it contrary to good conscience, supposing it was *then* his intent to insist upon his mortgage, to keep silence? Had he a right to consider that he had done enough when he had put his mortgage upon record? Very clearly, under our law (Code, § 2966), if one stand silently by and permit another to purchase his *property* from a third person without disclosing his *title*, it will not be a reply to say *his title* was upon record. At any rate, the broad language of the Code, § 2966, has got no such qualification. Why should the fact that his interest in the premises is as a mortgagee and not as owner make any difference? I take it that the authorities, though it must be admitted that they are not in harmony, may in the main be harmonized, if we consider the principle on which the doctrine is based. They all go on the idea that it is a man's equitable duty to interfere by the assertion of his right when he sees some one about to act upon the truth of a denial of that right. In the case where one, in the presence of the true owner, and with his knowledge, sets up a title to property and sells it to another, there is a direct denial of the true owner's right. The *sale*, without more, is antagonistic to the *title* of the true owner. And if he stand silently by and permit the sale without announcing his right, he is estopped. This I think is the uniform current of the authorities: Kerr on Fraud and Mistake, 126; 5 Min. 530; 19 Wend. 557; 5 Leigh, 1; 2 Ala. 514; 34 Vt. 598; 1 Johns. Ch. 344; 6 id. 268; 7 Watts, 334; id. 168. But when the right set up is only a lien or incumbrance, the *simple sale* of the *title* is not inconsistent with the lien; mere silence, in the presence of such an act, will not estop; one is not bound upon all occasions to give warning to incautious people. He has a right to assume, *if nothing appear to the contrary*, that the purchaser has been informed of the lien, has examined the record, and that the sale and purchase are in view of the truth of the case. But suppose more is done than a mere sale; suppose, as is the case put by the judge, it is evident from the facts that the sale is under an announcement directly in the

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teeth of the mortgagee's claim. Is it not just as much his duty to prevent the fraud as in the case of an assertion of title adverse to his title. Had this sale taken place with no announcements except that Sells was the true owner, there would have been nothing in this antagonistic to the mortgage, and Markham might well rest upon his record, taking it for granted that the seller was acting in good faith, and that the buyer had examined the record and knew of the mortgage. But when it was (if it was) announced that the property was to go to the purchaser free from incumbrance, "clear and free from incumbrance," was not this an announcement in the teeth of Markham's claim, supposing he then intended that his lien should continue. If Sells did have it announced that the property was free from incumbrance, and it was not, he was, under our law, guilty of a crime. For it is a crime in this State "if one, in the sale of real or personal property, shall defraud another by falsely representing that it is not subject to any lien or mortgage, knowing the same to be subject." Code, § 4599. Had not the bystanders in this case, even supposing that every one of them had heard of the mortgage, a right to suppose that Sells was not committing a crime? Was it not a fraud if Markham stood by and heard such announcement and kept still? Was it not a breach of his legal and equitable duty and contrary to good conscience to stand by and permit, not only his neighbor to be defrauded, but a crime to be committed, he *knowing what was going on*, and able, by a mere word of his, to prevent it? The crime and the fraud in the case would be the sale by Sells, under the announcement that the purchaser would buy the property free from incumbrance, he *knowing to the contrary*. If Markham and Sells did, at that time, know that the purchaser would not get the property free from incumbrance; then Sells was guilty of a crime, and Markham, by his silence, put it in his power to commit that crime. Assuming that Mr. Markham did then intend to insist on his mortgage, even after the property was sold, we think he was guilty of an omission to perform a legal and equitable duty which the principles of good conscience cast upon him, to the hurt of O'Connor; and this is true, though he may have intended no wrong. We do not think, therefore, that there was error in the charge.

2. Was there error in the refusal to charge? The request was, in substance, that in order to find against the mortgage, the jury must be satisfied that Markham intended by his silence to commit a fraud. It has been argued eloquently and strongly that fraud is always a question of fact and intent, and must necessarily be a matter for the determination of a jury, and that the refusal of this request was a virtual withdrawal of the question of fraud, and especially of the intent of Mark-

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ham, from the jury. This line of argument forgets the distinction between actual and constructive fraud, so pertinently and concisely put by our Code, § 3173. The latter, as the Code says, "may be consistent with innocence." A man may be guilty of it who did not think he was doing wrong. The fraud in this case, if there be fraud, is the very kind of fraud which the Code says may be consistent with innocence, to wit: constructive fraud. Mr. Markham may not have intended any wrong, he may not have known that it was his equitable duty to prevent Sells from defrauding his neighbor, and that he had no right to stand by and see O'Connor buy under an announcement that he would get the property free from incumbrance, when he knew that there was an incumbrance. Or it may be that Mr. Markham had faith in Sells, and expected to have his mortgage paid out of the purchase-money. In either event he would have intended no fraud, and yet he would be just as much estopped as if he had acted with a deliberate intent to commit a fraud. It would be a constructive fraud, a fraud in law, though the party was innocent. The request, therefore, was calculated to mislead the jury. The true doctrine was put in the charge as given. Markham, under the circumstances as supposed, would be estopped, not because he was guilty of an intended fraud at the time of the act, but because it would be a fraud, if, acting as he did, he should *now* have the benefit of the mortgage, assuming that the announcement was made, as some of the witnesses say, that the property was sold clear and free from incumbrances. We think it was Mr. Markham's duty, if he intended to insist on his mortgage, to let the truth be known, either at the bidding, or to notify the purchaser before the title was made, or the notes given, or money paid. If he failed to do any of these things, we do not say that he was guilty of a fraud in not doing so. But the law, in our judgment, is that if he failed, as stated, it would be a fraud to set up his mortgage *now*; that he is estopped; that the law holds him to the implied admission he then made, either that his mortgage was settled, or that there was some arrangement between him and Sells by which he would get his money out of the proceeds of the sale. He may have intended no wrong at the time. It is the setting up of his mortgage now that is wrong. Hence, we think the request was properly refused.

Judgment affirmed.

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(58 Ga. 33.)

Criminal law — firing prison by prisoner — intent.

A prisoner burned a hole in the guard-house wherein he was confined for the purpose of escaping and with no intent to consume or to generally injure the building. *Held*, not guilty of an attempt to burn a house. (See note, p. 257.)

INDICTMENT for arson.

Paul Jenkins was placed on trial for the offense of arson, alleged to have been committed upon the guard-house, in the town of Fort Valley, on March 22d, 1874. The defendant pleaded not guilty. The evidence made the following case:

The guard-house referred to in the indictment had two doors to it, an outer and an inner door. On the day alleged the inner door was discovered to have a hole burned through it about one foot in diameter. The floor at the back of the room was also burned. At that point ignited matches were discovered. Burnt paper was found between the outer and inner door; also on the floor. Playing cards were also on the floor. The defendant was the only occupant of the guard-house. Fire could not have been communicated to the points above designated from without. Before the burning at the back of the room was discovered, the defendant stated that the inner door became ignited from lighting his pipe. After the attempt to burn the floor was perceived, he offered no explanation. The house is within the corporate limits of the town of Fort Valley. Had the guard-house been burned, it is probable that no other house would have been ignited. It is a small one-room brick house, twelve by fifteen feet. The defendant was not drunk when he was discovered, but looked as if he had been. There was one window to the house — one foot by two — with bars one-fourth of an inch apart. The outer door was covered with tin; the inner door was of two inches pine plank; one and one-half or two feet between the doors. The fire was out when the house was entered.

The jury returned the following verdict: "We, the jury, find the prisoner not guilty of arson, but of the attempt to burn, and we recommend the court to commute the sentence from hanging to imprisonment for life."

The defendant moved for a new trial because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

Duncan & Miller, for plaintiff in error.

W. S. Wallace, Solicitor-General *pro tem.*, by *W. B. Hill*, for the State.

TRIPPE, J. 1. The attempt "to burn a house," referred to in section 4376 of the Code, must mean an *attempt to commit* the burning defined in section 4381, that is, "to consume or generally injure the house." One is not guilty of the crime of burning unless "the house is consumed or generally injured." If the offense of burning requires a total destruction or general injuring of the house to make it complete, then the attempt to burn involves the intention to destroy or to generally injure. If the facts fall short of proving this intent, then the crime of attempted arson is not proved. Rape is the carnal knowledge of a female forcibly and against her will. An attempt to commit rape implies the intent to have that knowledge forcibly, etc. An assault with intent to murder must have in it all the elements which constitute murder, except the death of the party assaulted. So an attempt to commit arson must have all the features of arson except the actual destruction or the generally injuring of the house — that is, it must be shown to have been the intent of the defendant to do one or both of those things. So thought the Supreme Court of North Carolina, in the case of *The State v. Mitchell*, 5 Ired. 350. There the defendant was indicted for burning the jail in which he was confined. The door of the room in which he was placed and the ceiling of that room were partially consumed. The question raised was, that if the prisoner only intended to burn off the lock, so he could escape, and not to burn down the jail, he was not guilty. A contrary charge was given to the jury, and on a review of the case, the Supreme Court held that if it was not the intention of the prisoner to burn or destroy the jail, but he put fire to the lock to burn it off to effect his escape, and not to destroy, the felony was not complete. It was added by the court that if the prisoner willfully put fire to the jail with the intent to effect his escape by consuming or destroying it, he would be guilty if the jury should believe that his secondary intent was to burn and destroy the jail, although his main intent was thereby to effect his escape. This qualification was correct. The court referred to the case of *The People v. Otteral*, 18 Johns. 115, as an authority for the decision. That case does sustain the one quoted from Iredell, and asserts the same principle. The North Carolina case discusses the matter at length, both on principle and authority, and we think the conclusion is right. It is unnecessary to review the testimony contained in the record to show that, as it appears, this intent on the part the defendant in this case was

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not sufficiently shown to authorize a conviction involving life or imprisonment for life. It may be stated that the place where the attempt to set fire was made, the fact that there were materials unconsumed whereby the fire might have been continued, especially when taken in connection with the statement made by the chief witness for the State that he thought the defendant "attempted to burn a hole," make it doubtful whether it was the intent of the prisoner, in the language of the Code, to consume or generally injure the house. This statement was made by the witness without objection, and after he had given a detailed account of all that he saw and the appearance of every thing connected with the jail.

2. At any rate, under this testimony, where such consequences are involved, we think that an investigation on another trial would be best.

Judgment reversed.

NOTE.—The contrary doctrine was held on a similar state of facts in *Luke v. State*, 49 Ala. 30; 20 Am. Rep. 269; also in England: *Foster*, 258, 259; 1 Hale's P. C. 567, 569. See, also, *Jcase v. State*, 28 Miss. 100; *Com. v. Posey*, 4 Cal. 109; *Stevens v. Com.*, 4 Leigh, 683. In the case of *The Queen v. Faulkner*, decided January 16, 1877, by the Irish Court for Crown Cases Reserved (11 Irish L. T. R. 13), a similar question was decided in accordance with the principal case. The indictment was for arson of a ship, and the case was this:

The prisoner, who was a seaman on board, went into the hold for the purpose of stealing rum there stored. Having tapped a barrel the rum ran out, and while he was trying to put a spile in the hole, out of which the rum was escaping, the rum caught fire from a lighted match in his hand; in consequence of which the ship took fire and was consumed. It was conceded that the prisoner did not in fact intend to burn the ship; and no question was left to the jury as to whether he knew the probable consequences of his act or as to his reckless conduct. The jury were directed to find the prisoner guilty if, although he had no actual intention of burning the ship, they should find that he was engaged in stealing the rum, and that the fire took place as above stated. He was convicted. On a case reserved, *held*, that the direction was erroneous, and that the conviction should be quashed.

Peter O'Brien, for the prisoner. The broad proposition contended for by the crown counsel at the trial was that, once it was proved the prisoner had set out to commit felony, he was responsible for every thing which would not have occurred but for his having done so; that, no matter how remotely or indirectly connected with the felony he had resolved upon perpetrating the act imputed as a crime might be, still he was criminally answerable, whether the committing of the felony was the *causa causans* or merely the *causa sine qua non* of the alleged criminal result, and that he was equally responsible; and they relied upon 2 East's P. C. 1019, where it is stated that if a person shoot a fowl with the intention to steal it, the first attempt being felonious, the party must abide *all* the consequences. This was the wide proposition pressed by the crown below, and accepted with hesitation by the judge, who stated he would reserve the case for this court. It was conceded by the crown that the prisoner did not in fact intend to burn the ship, and it may be said it was also conceded that he did not know it was the probable consequence of any thing done by him that the rum should take fire and the ship be burned. No such question was submitted to the jury, and the crown counsel did not venture to contend before the jury that the prisoner knew the probable consequence of his act would be that the rum should take fire and explode, and the ship burned,

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when he himself might be either instantaneously destroyed by the explosion or ultimately burned to death by the burning of the ship, which was at the time in mid-ocean. Now, having ascertained what position the crown assumed at the trial, the case may be tested by the analogy of the common-law definition of arson, the definition of the term "malice," and by cases decided on the particular statute and upon sections of it, where the very words used in the present indictment are used — that is to say, the words "unlawfully" and "maliciously." The definition of arson at common law is "the willful and malicious burning of the house of another." 3 Inst. 66, 67; Hale's P. C. 566. Coke says that it should be done "*voluntarie et ex malitiâ præcogitatâ*;" and it is laid down in Archbold, 53, 67, that the burning must be willful and malicious to be an offense either at common law or under the statute, for which he cites Coke and Blackstone, and that a burning arising from negligence or mischance is not sufficient. Taking, then, the definition of arson at common law, can it be said that the case for the crown is supported by any analogy it affords? as it is it could never be contended here that the burning was "*voluntarie*" — the contrary was, in fact, conceded. Again, take what was so strongly pressed by the crown, and for which position they cited 2 East's P. C., ch. 21, and Foster, 258, that a man shooting at a fowl with the intention of stealing it, and killing a man, is liable for murder. Now, that case is distinguishable from the present, because there the person firing the gun did intentionally an act *malum in se* of itself calculated to do the particular mischief, while here the act done was not of itself calculated to do the damage, irrespective of the extrinsic and fortuitous circumstance of the jet of rum shooting out in the very line of the lighted match — the pressure of the rum to make it shoot as it did was, so to speak, an external agent, and the fact of its coming upon the line of the lighted match was a mere chance. Besides, there is no case which shows that this constructive doctrine of transferring the malice with which one act is done to another, so as to render that other a felony, is applicable where that other act would not, though done maliciously, be a felony at common law; and burning a ship out at sea is a felony created by statute, and not one at common law. But the crown contended that, no matter whether the putting the spile in the cask was done before or after rum had been abstracted, the legal result was the same — no matter whether the prisoner was putting the spile in the cask for the purpose of more conveniently taking the rum, or, having taken some of the rum, for the purpose of stopping the flow and waste of the rum. Certainly if the spile was being put in to stop the further waste of the rum, the felony of taking having been completed, the prisoner would not be liable for the arson of the ship, which is a felony, because in that case the act which was the immediate cause of the burning was not done *felleo animo*: Butler's Coke, Litt. 391, where it is stated felony *ex vi termini significat quodlibet capitale crimen felleo animo perpetratum*. Besides, the principle *actus non facit reum nisi sit mens rea* (which COCKBURN, C. J., says in the *Queen v. Sleep*, L. & C. 44-54, is the foundation of all our criminal procedure), would apply. *Actus* means the act which is the immediate cause of the thing done.

Take the definition of malice — "a wrongful act done intentionally without just cause or excuse." *M'Pherson v. Danieli*, 10 B. & C. 272; *Bromage v. Prosser*, 4 id. 255. On examining these cases and the instances given to illustrate the definition, it will be found that the wrongful act is one *malum in se*, intentionally done, and one calculated of itself, independently of extrinsic agency, to do the particular mischief.

But, take the cases on the very statute on which the prisoner is indicted, and in particular that of the *Queen v. Pembrton*, L. R., 2 C. C. R. 119. In that case the prisoner was indicted for unlawfully and maliciously committing damage above the value of £5 to a window in a house, and the jury found that the prisoner threw a stone which broke the window, but that he threw it at some people he had been fighting with, intending to strike one or more of them, but not intending to break the window; and they returned a verdict of guilty. It was held that, upon this finding, the conviction should be quashed. The court, at the same time, intimated that, if the jury found that the prisoner was aware the window was where it was, and that he was likely to break it, and

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was reckless whether he did so or not, he might have been in that event properly convicted. Now, that case is a much stronger case than the present, for there the prisoner deliberately threw a stone, and threw it intending to strike, and threw it also in a place in a street opposite a house, where it was very probable that it would do injury, and, nevertheless, the conviction was quashed. Here, it is conceded that he did not intend to burn the rum or ship; and there is no finding by the jury, for it was not left to them to determine — and, indeed, the contention could not be seriously made — that the prisoner knew that the probable consequence of his act would be to set fire to the ship, and that he was reckless as to whether it was set fire to or not.

This case is conclusive in the prisoner's favor, and to the like effect is the principle of the judgment in *Queen v. Child*, L. R., 1. C. C. R. 309, and in *Queen v. Welch*, 10 id. 121. In the last case the jury found, as a matter of fact, that the prisoner knew that the probable consequence of his act might be to kill the man, and that he was reckless as to whether he was killed or not. Here it was not contended, nor could it be, that the prisoner knew it was a probable consequence of his act that the ship would be burned, and that he was reckless whether the ship was burned or not. But some of the court seem to think, and it may now be contended on the part of the court, that it was a natural and probable consequence of the prisoner's act, having brought the lighted match near the gun, that the rum should take fire, and that, therefore, he should be held responsible for what was the natural consequence of his act. Even if this be so, it cannot now be relied upon, because the question what was a natural and probable consequence of the prisoner's act, was a question of fact to be determined by the jury, and this question was never submitted to them. Conceding, for the sake of the argument, that even in construing the particular statute it is a presumption in law — a *presumptio juris et de jure* — that a man intends the natural consequence of his act, surely it must be antecedently determined by the jury as a matter of fact, whether or not the thing complained of was or was not a natural or probable consequence of the prisoner's act.

The Attorney-General (*May*, Q. C.,) and *Green*, Q. C., for the crown. If a man, intending to commit a felony, by accident set fire to another's house, this would be arson at common law and also within the statute. Arch. (18th ed.) 536; Foster's Cr. Law, 258-9. A shooteth at the poultry of B and, by accident, killeth a man; if his intention was to steal the poultry (which must be collected from circumstances), it will be murder by reason of that felonious intent. East's P. C. 1019. It must be a malicious and voluntary burning, otherwise it is not a felony but only a trespass, and, therefore, no negligence or mischance amounts to it — as if an unqualified person, by shooting at game, happens to set fire to the thatch of a house. In this case, however, it should seem to be understood that he did not intend to steal the poultry, but only to commit a trespass; for otherwise, the first intent being felonious, the party must abide all the consequences. Id. 1031. Hence, it appears that though the primary intention of the party were only to burn his own house, yet if, in fact, others were burnt, being adjoining and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately following, and necessarily following from the original act done, it is felony, and the malice shall be applied to the consequential act in this case. The prisoner went to a place he had no business to go to. He brought the match with him to enable him to commit the larceny, and, while in the very act of committing the felony, set fire to a portion of the inflammable material which he was stealing, and the immediate consequence was the burning of the ship. The felonious intention "must be applied to the consequential act," and the prisoner must be held responsible for the burning of the ship. In *Reg. v. Ward*, L. R., 1 C. C. R. 356, the court held that "unlawful" wounding must be "malicious," and that malice may be properly inferred from the illegal act of firing the shot, though fired apparently with the intention of frightening away the birds rather than of hurting the prosecutor. And Cockburn, C. J., says: "When a man does an act malicious of itself, but without intending larger consequences, are not the limited results sufficient to make him respon-

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sible for all? To support an indictment for murder, it is enough to prove that the act causing death was done maliciously, and it is not necessary to show an intention to kill." And MELLOR, J., observes that in Foster, p. 257, it is stated that "malice and malicious" are frequently used in a general sense, "as denoting a wicked, perverse, and incorrigible disposition." Here the felonious act of the prisoner, in showing a wicked, perverse, and incorrigible disposition, supplies the malice required by the words of the statute. *Reg. v. Pembliton*, L. R., 2 C. C. R. 119, is so completely rested on the finding of the jury, which negatived the existence of malice either actual or constructive, that it does not touch the question upon which this conviction must be upheld, unless this court is prepared to overrule the proposition stated as law by Foster, Hale, and East, and adopted in all modern text-books, and in the last edition of Archbold. And in that case it is to be observed that the original act of the prisoner was not felonious, and that neither was the offense charged a felony.

DOWSE, B. I would have had no difficulty in sustaining the conviction if the case, as originally stated, were before the court, as I am of opinion that a man engaged in the commission of a crime is responsible for the consequences which follow. An alteration, however, was made in the case. I am of opinion that the conviction ought to be quashed, and I come to that conclusion for the simple reason that this amendment took away entirely from the jury every question as to what might be the reasonable, natural, and probable results of the prisoner's act. I, therefore, consider that the direction of Mr. Justice LAWSON was erroneous, and that the prisoner, having been unlawfully convicted on that ground, the conviction should be quashed.

LAWSON, J., and DEASY, B., concurred that the conviction should be quashed.

BARRY, J. A very broad proposition has been contended for by the crown — namely, that if, while a person is engaged in committing a felony, or, having committed it, is endeavoring to conceal his act or prevent a spoil or waste consequent on that act, he accidentally does some collateral act which, if done willfully, would be another felony either at common law or by statute, he is guilty of the latter felony. I am by no means anxious to throw any doubt upon or limit in any way the legal responsibility of those who engage in the commission of felony or acts *mala in se*, but I am not prepared, without more consideration, to give my assent to so wide a proposition. No express authority, either by way of decision or dictum from judge or text-writer, has been cited in support of it. The authorities mainly relied upon are those which lay down that, if homicide or the burning of a house be the direct though unintended result of an act felonious or *malum in se*, the perpetrator will be guilty of murder, or manslaughter, or arson, as the case may be. As regards the cases of homicide, they may be referred to principles applicable to that class of offense. The authorities as to arson are more in point, but they all put the case of an act felonious or *malum in se*, willfully done and directly causing the ultimate injury. As to whether there may be any substantial distinction between the act of lighting the match, in the present case and the shooting at the dove with the felonious intent in the authorities cited, or whether this doctrine of constructive willfulness or malice extends to any but felonies at common law, I shall not pronounce any opinion, as I shall consider myself bound, for the purposes of this case, by the authority of *The Queen v. Pembliton*, L. R., 2 C. C. R. 119. That case must be taken as deciding that to constitute an offense under the Malicious Injury to Property Act, § 51, the act done must be in fact intentional and willful, although the intention and will may, perhaps, be held to exist in, or be proved by, the fact that the accused knew that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences. The present indictment charges the offense to be under the 42d section of the same act, and it is not disputed that the same authorities must be applied to both sections. I confess that, as at present minded, I am not altogether satisfied with that decision so far as it seems to be rested upon the construction to be given to the words "unlawfully and maliciously" in that particular statute. To constitute the crime of arson at common law the setting fire to the house must be unlawful and malicious; yet,

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it is undisputed that a person firing a shot with a felonious intent, and thereby unintentionally burning a house, is guilty of feloniously burning it ; and certainly, it seems difficult on logical grounds to see why the words "unlawful and malicious," when used to describe the essential attributes of the burning of a house as an offense at common law, are to receive a different interpretation from the same words when used in the statute, the object of which is simply to place the burning of a house and the burning of a ship in the same legal category. Perhaps the true solution of the difficulty is, that the doctrine of constructive malice or intention only applies to cases where the mischief with which the accused stands charged would be, if maliciously committed, an offense at common law. The case of *The Queen v. Pembliton* has been since, in some degree, confirmed in *The Queen v. Welch*, L. R., 1 Q. B. D. 23. I shall, as I have said, under the circumstances of the case before us, act on the authority of *The Queen v. Pembliton*, without pledging myself to adopt its reasoning or conclusions under a different state of facts. It has been, however, contended that *The Queen v. Pembliton* is distinguishable from the present case. It was said — first, that the original act of the prisoner in that case was not felonious ; and, secondly, that the offense charged was not a felony ; and that, therefore, the old authorities upon which the crown now relies did not apply in that case. How far both or either of these distinctions are to be regarded at the present day I do not stop to consider ; it is sufficient to say that the decision of the Court of Criminal Appeal in England was based upon no such distinction. But it was, secondly, contended that, as in that case it was suggested by the judges that a reckless disregard by the prisoner of the obviously probable consequences of his own act might constitute the requisite "malice," or justify a jury in finding that such act was willful and malicious within the statute, we should, upon the wording of the case as originally stated, assume that this question of recklessness and so forth was left by the judge to the jury, or spontaneously considered by them and decided in the affirmative against the prisoner. It was, perhaps, possible that, upon a critical analysis of the very words of the original case, they were consistent with a possibility that such a question was presented to the jury, but reading the case I was, upon its construction, convinced that no such question was considered by the jury ; it was not pretended by the crown counsel that, as a matter of fact, such a question was ever suggested at the trial, and we have sitting here with us the judge who tried the case to tell us that no such issue was raised. If such an issue had been raised it would have been, according to Mr. Justice BLACKBURN, whether the prisoner "knew that the natural consequences of his act would be to fire the ship, and whether, although that was not his wish, he was yet reckless whether he did it or not ?" and I am of opinion that the evidence would probably not have justified the jury in finding the issue against the prisoner. I would, therefore, have declined to sustain the conviction upon the assumption (based upon the phraseology of the case originally stated) that an issue was considered by the jury, which I know as a fact was not considered by them, and which, if considered by them, ought probably to have been determined in favor of the prisoner. All difficulty, however, on this branch of the argument is removed by the amendments made in the case by the learned judge who reserved it for our consideration. The jury were, in fact, directed to find a verdict of guilty upon the simple ground that the firing of the ship, though accidental, was caused by an act done in the course of, or immediately consequent upon a felonious operation, and no question of the prisoner's malice, constructive or otherwise, was left to the jury. I am of opinion that, according to *The Queen v. Pembliton*, that direction was erroneous, and that the conviction should be quashed.

FITZGERALD, J. I concur in opinion with my brother BARRY, and for the reasons he has given, that the direction of the learned judge cannot be sustained in law, and that, therefore, the conviction should be quashed. I am further of opinion, that, in order to establish the charge of "felony" under section 42, the intention of the accused forms an element in the crime to the extent that it should appear that the defendant intended to do the very act with which he is charged, or that it was the necessary consequence of

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some other felonious criminal act in which he was engaged, or that, being a probable result which the defendant foresaw, or ought to have foreseen, he nevertheless persevered in such other felonious or criminal act. The prisoner did not intend to set fire to the ship; the fire was not the necessary result of the felony he was attempting; and if it was a probable result, which he ought to have foreseen, of the felonious transaction in which he was engaged, and from which a malicious design to commit the injurious act with which he is charged might have been fairly imputed to him, that view of the case was not submitted to the jury — on the contrary, it was excluded from their consideration on the requisition of counsel for the prosecution. Counsel for the prosecution, in effect, insisted that the defendant, being engaged in the commission of, or in an attempt to commit a felony, was criminally responsible for every result that was occasioned thereby, even though it was not a probable consequence of his act, or such as he could have reasonably foreseen or intended. No authority has been cited for a proposition so extensive, and I am of opinion that it is not warranted by law. Referring to the statute on which the prisoner is charged, it is to be observed that, in several instances, the sections creating substantive felonies are followed by others making an attempt to do the same thing also a felony. Now, it is obvious that an attempt to do a particular thing necessarily involves the intention to commit the act. If, in the case before us, the burning rum had been extinguished before the ship took fire, could it be contended that an indictment for a willful and malicious attempt to set fire to the ship could have been sustained under section 44?

FITZGERALD, B. I am of opinion that the direction of the learned judge at the trial was wrong, and that the conviction cannot be sustained. There can, I think, be no doubt that malice or malicious intent (which seem to me to mean the same thing) is an essential part of the character of the felony charged in the indictment. In this case, I am of opinion that, while the question of the particular malicious intent of burning the vessel was expressly withdrawn from the jury, the question of malice or malicious intention was not left to the jury at all. Upon the matters of fact stated in the case to have been proved, I am of opinion that the jury might, though the question of such particular malicious intent was withdrawn from them, most reasonably have found the malice or malicious intent necessary as an element of the crime charged; but I do not think that the judge was warranted in affirming it as an inference of law. This, it appears to me, the judge has done, in directing the jury that "if the fire took place in the manner above stated," which I understand to mean, if over and above believing that the prisoner "was engaged in stealing the rum," the jury also believed to be true the matters of fact stated in the case to have been proved, the jury "ought to find him guilty." The utmost which I can conceive the jury to have found, over and above the facts stated, is that, at the time when the prisoner set fire to the ship he was actuated by a felonious intent which no doubt is malice; but we must take this not to have been the particular malicious intent of burning the vessel, but the particular felonious intent, which is an element of larceny. Its whole force, therefore, in the present case, if any is as evidence of malice in general — that is to say, as showing the *mens mala* or *fellea*; any particular malicious intent is evidence conclusive of the *mens mala* or malice, though the *mens mala* may exist in the absence of innumerable particular malicious intents. In my opinion, this general malice might have been sufficiently connected with the overt act in this case, from which the injury resulted, if the jury had found that the injury was a reasonable consequence — that is to say, a consequence which any reasonable man might have anticipated as probable — of the act or acts, or some or one of them, which formed the *res gestæ* of the felony which the prisoner is found to have been committing. In that sense, the consequence is not too remote. The very object of the amendment which has been made in this case, as I understand it, is to show that this question was not left to the jury. Now, however clearly I may be satisfied that the jury ought, as a matter of fact — if the question had been left to them — to have found that the injury was the reasonable consequence of an act or acts done with a felonious intent, I cannot draw

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the conclusion as a matter of law. I am only anxious that it should be understood that this case cannot be taken as deciding the general malice, if conclusively proved, and found by the jury to apply to the overt act which is the *corpus delicti*, will not give it the form of crime which is the subject of indictment in a case like the present, even though the particular malicious intent of effecting the injury alleged is not proved. I believe that no such position was established, or, so far as I can see, intended to be established by the case of the *The Queen v. Pembliton*; and, for myself, I am quite satisfied that in cases like the present, if the overt act from which injury results be actuated by any malice, and the injury is the reasonable consequence of such overt act so actuated, malice would be sufficiently established. As for Mr. O'Brien's argument that an act done by the thief, while a larceny is being effected, for the purpose of economizing its effect, so that the amount of property being abstracted shall be no more than exactly what the thief wants, is not an act effected by the felonious intent, which makes the whole thing done a felony, I think it must be left for the jury to whom it may be addressed; it is sufficient for me to say that a jury might reasonably take a different view. On the whole, though I am clearly of opinion that there was evidence on which the jury might have found the malice necessary to sustain the indictment — and that notwithstanding the question expressly withdrawn from it — yet, I think the question of malice was not left to the jury at all. The conviction cannot be sustained.

O'BRIEN, J. I am also of opinion that the conviction should be quashed. And I was of that opinion before the case for our consideration was amended by my brother LAWSON.

I had inferred from the original case that his direction to the jury was to the effect now expressly stated by amendment; and that, at the trial, the crown counsel conceded that the prisoner had no intention of burning the vessel or of igniting the rum, and raised no question as to prisoner's imagining, or having any ground for supposing that the fire would be the result or consequence of his act in stealing the rum.

With respect to *The Queen v. Pembliton*, L. R., 2 C. C. R. 119, it appears to me there were much stronger grounds in that case for upholding the conviction than exist in the case before us. In that case the breaking of the window was the act of the prisoner. He threw the stones that broke it. He threw at it with the unlawful intent of striking some one of the crowd about, and the breaking of the window was the direct and immediate result of his act. And yet the court unanimously quashed the conviction, upon the ground that, although the prisoner threw the stone intending to strike some one or more persons, he did not intend to break the window. The court, at the same time, intimated their opinion that if the jury (upon a question to that effect being left to them) had found that the prisoner, knowing the window was there, might have reasonably expected that the result of his act would be the breaking of the window, that then the conviction should be upheld.

During the argument of this case, the crown counsel required us to assume that the jury found their verdict upon the ground that, in their opinion, the prisoner may have expected that the fire would be the consequence of his act in stealing the rum, but nevertheless did the act recklessly, not caring whether the fire took place or not. But at the trial there was not even a suggestion of any such ground, and we cannot assume that the jury formed an opinion which there was no evidence to sustain, and which would be altogether inconsistent with the circumstances under which the fire took place. The reasonable inference from the evidence is that the prisoner lighted the match for the purpose of putting the spile into the hole to stop the further running of the rum, and that, while he was attempting to do so, the rum came in contact with the lighted match and took fire.

The recent case of *The Queen v. Welch*, L. R., 1 Q. B. D. 23, has been also referred to, and has been relied on by the crown counsel, on the ground that, though the jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare that had died from the injury inflicted by the prisoner, the prisoner was, nevertheless, con-

victed on an indictment charging him with having unlawfully and maliciously killed, maimed, or wounded the mare, and such conviction was upheld by the court.

But, on referring to the circumstances of that case, it will be seen that the decision in it does not in any way conflict with that in the previous case of *The Queen v. Pembliton*, and furnishes no ground for sustaining the present conviction. Mr. Justice LINDLEY, who tried that subsequent case, appears to have acted in accordance with the opinion expressed by the judges in *The Queen v. Pembliton*. Besides leaving to the jury the question of prisoner's intent, he also left them a second question — namely, whether the prisoner, when he did the act complained of, knew that what he was doing would or might kill, maim, or wound the mare, and, nevertheless, did the act recklessly, and not caring whether the mare was injured or not. The jury answered that second question in the affirmative. Their finding was clearly warranted by the evidence, and the conviction was properly affirmed. By those two questions a distinction was taken between the case of an act done by a party with the actual intent to cause the injury inflicted, and the case of an act done by a party knowing or believing that it would or might cause such injury, but reckless of the result whether it did or did not. In the case now before us, there was no ground whatever for submitting to the jury any question as to the prisoner's believing or supposing that the stealing of the rum would be attended with a result so accidental, and so dangerous to himself.

During the argument doubts were suggested as to the soundness of the decision in *The Queen v. Pembliton*, but, in my opinion, that case was rightly decided, and should be followed. Its authority was not questioned in *The Queen v. Welch*, in which the judges, who constituted the court, were different from those who had decided *The Queen v. Pembliton*, with the exception of Lord COLERIDGE, who delivered the judgments of the court on both occasions.

KEOGH, J. I have the misfortune to differ from the other members of the court. I think it very fortunate for the prisoner that this case has lasted so long, and has received such elaborate consideration; for I cannot be considered as violating judicial confidence when I state that, if the case was decided when the arguments closed, the conviction would stand. With regard to the alteration made by the learned judge who tried the case, I have read it, and I do not understand it to make a particle of difference from what he had so clearly and distinctly stated during the progress of the argument. With regard to the decision of the English Court of Criminal Appeal in the case of *The Queen v. Pembliton*, so much relied upon for the prisoner, there appeared to be considerable hesitation among the members of the Bench whether they could venture to overrule that decision. Baron DEASY, indeed, mentioned that he would not hesitate to do so, and, in doing so, he would be only following suit to the Court of Criminal Appeal in England, that court having overruled the decision of this court in the case of *The Queen v. Fanning*. Probably, I would not have the same cause for not hesitating to overrule them, for in that case I was in the minority, whose opinion they affirmed; but in this particular case I see no reason why, having a very clear and distinct opinion in favor of a conviction, I should not express it, notwithstanding that I have the misfortune to differ from my learned brethren and also have, in some way, to run at cross-purposes with the decision in *The Queen v. Pembliton*. I am, then, of opinion that the conviction should stand, as I consider all questions of intention and malice are closed by the finding of the jury that the prisoner committed the act with which he was charged whilst engaged in the commission of a substantive felony. On this broad ground, irrespective of all refinement as to "recklessness" and "willfulness," I think the conviction is sustainable. And, although, if necessary, prepared to decide this case irrespective of *The Queen v. Pembliton*, I think I could distinguish this case from *The Queen v. Pembliton*, in which the judges appear to have been carried away by the very specific negative findings of the jury as to the intention of the defendant.

PALLES, C. B. I concur in the opinion of the majority of the court, and I do so for the reasons already stated by my brothers DOWSE and FITZGERALD, BB. I agree with

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my brother KEOGH, that, from the facts proved, the inference might have been legitimately drawn that the setting fire to the ship was malicious within the meaning of the 24th and 25th Vict., c. 97. I am of opinion that that inference was one of fact for the jury, and not a conclusion of law at which we can arrive upon the case before us. There is one fact from which, if found, that inference would, in my opinion, have arisen as matter of law, viz., that the setting fire to the ship was the probable result of the prisoner's act in having a lighted match in the place in question; and if that had been found, I should have concurred in the conclusion at which Mr. Justice KEOGH has arrived. In my judgment, the law imputes to a person who willfully commits a criminal act an intention to do every thing which is the probable consequence of the act constituting the *corpus delicti* which actually ensues. In my opinion, this inference arises irrespective of the particular consequence which ensued being, or not being foreseen by the criminal, and whether his conduct is reckless or the reverse. Thus much I have deemed it right to say, in order to prevent misconception as to the grounds upon which my opinion is based. I wish to add one word as to *The Queen v. Pembliton*. In my opinion, the learned judges who were parties to that decision never intended to decide, and did not decide any thing contrary to the view I have expressed. That they did not deem actual intention, as distinguished from implied intention, is shown by the subsequent case of *The Queen v. Welch*, in which an indictment, under section 40 of the same act, was upheld, although actual intention was negatived by the jury. The facts found, in answer to the second question in that case, cannot have been relied upon as evidence of actual intention. As evidence, they would have been valueless in face of the finding negativing the fact which, in this view, they would have but tended to prove. Their value was to indicate a state of facts in which intention was imputed by an irrefutable inference of law. It was not germane to the actual decisions in *The Queen v. Pembliton* and *The Queen v. Welch* to determine whether the state of facts from which this inference of law arises is that suggested in the first case, and acted upon by the second, or the circumstances of one act being the natural consequence of the other. Some of the learned judges, no doubt, during the argument, and in their judgments in the first case, indicate a state of facts from which this inference would arise. They do not decide that the same inference might not arise in the other state of facts to which I have alluded. If, contrary to my own view of that case, it shall be held to involve that intention to do that which is a necessary consequence of a wrongful act willfully committed is not an inference irrefutable as matter of law, I must say, with unfeigned deference, that I shall hold myself free hereafter to decline to follow it. The Lord Chief Justice of the Court of Common Pleas, who, in consequence of illness, has been unable to preside to-day, has authorized me to state that he considers that the case before us is concluded by *The Queen v. Pembliton*.

REICH V. STATE.

(53 Ga. 73.)

Grand jury — alien on — plea in abatement to indictment.

Plea in abatement to an indictment that one of the grand jurors who found it was an alien. Held: good.

INDICTMENT for keeping open a tippling-house on the Sabbath day. On arraignment he pleaded that one of the grand jurors who found the indictment was an alien.

On demurrer said plea was stricken out.

H. L. Benning, M. H. Blandford and O. R. Russell, for plaintiff in error.

Peabody & Brannon, for State.

MCCAY, J. [After deciding an unimportant point.] We think the plea that one of the grand jurors was not a citizen is a good plea. Section 3916 of the Code clearly contemplates that a grand jurymen must be a citizen, and whilst the Constitution does not, in terms, require it, and only uses the word "persons," yet there is nothing in this inconsistent with the Code; and this has long been the law of this State. It was also the common law. 1 Chitty's C. L. 307; 5 Bacon's Abr. 312; 1 Bish. Crim. Law, § 795; 3 Coke Inst. 34; 9 Tex. 65; 5 Port. (Ala.) 484. So, too, we think the objection may be taken by special plea. There are some authorities seemingly to the effect that the challenge must be to the jury before bill filed; but it seems to us that this is unreasonable. How is a defendant to know that this secret inquest is proceeding to find a bill against him? Whatever objections there may be to a grand juror that a party can make, ought (and this has always been the practice in this State) to be made on the trial, and before pleading to the merits, and such, we think, was the practice in England. 1 Chitty's C. L. 307; Bacon's Abr., Juries (a.) 727.

Judgment reversed on the ground as to the alien grand jurymen.

STERN V. STATE.

(53 Ga. 229.)

Criminal law — intent — mistake of fact.

The keeper of a billiard table was indicted for permitting an infant to play billiards thereon without the consent of his parent or guardian. *Held*, that if defendant honestly believed from the appearance of the infant and from his answers to questions that he was of full age there could be no conviction. (See note, p. 268.)

Stern v. State.

PROSECUTION for the offense of allowing a minor — one Talmadge — to playing at billiards upon defendant's billiard table without the consent of his parent or guardian, contrary to the statute.

The evidence made out a *prima facie* case for the State, but for the defense it was shown that Stern, before allowing Talmadge to play on his table, had inquired as to his age and had been informed by said minor that he was an adult; that he appeared to be over twenty-one years of age, and that he was, in fact, within six months of maturity at the time that he indulged in the aforesaid game.

The County Court refused to consider this testimony, holding that upon proof of the playing of the game with the knowledge of the defendant, of the minority of Talmadge, and of the absence of the consent of his parent or guardian, conviction was the inevitable result.

The case was carried by *certiorari* to the Superior Court, where the judgment of the County Court was affirmed, and defendant excepted.

T. W. Rucker, for plaintiff in error.

Emory Speer, Solicitor-General, by *W. B. Thomas*, for the State.

MCCAY, J. 1. We agree with the counsel for plaintiff in error that the county judge did not take a proper view of the law on the trial. To make a crime, there must be the union of act and intent, or there must be criminal negligence. It is not conclusive evidence of guilt on the part of the defendant that he permitted this young man to play at his table; that the young man was, in fact, a minor, and that the parent did not consent. These facts, it is true, make a *prima facie* case, and if they stood alone, the guilt of the defendant would be manifest; but evidently there was evidence of another element in the case, which, by the return of the county judge, is shown not to have been considered by him in arriving at his conclusion. There was evidence going to show that the defendant might have been honestly mistaken as to the age of the young man. It is clear to us that if the defendant, after due diligence, thought honestly that this young man was not a minor, he is not guilty. If he did so think, after proper inquiry, the element of intent does not exist; the act was done under a mistake of fact. In such a case, there is no guilt and no crime. This is the doctrine of all the books, and is, besides, common sense and common justice.

2. Nor is there any thing in the nature of this offense which alters the rule. If one who shoots down his dearest friend by mistake, supposing him to be a dangerous wild beast or a burglar, is not guilty of any crime,

surely one who permits a minor to play billiards without the consent of the parent, under the honest belief that he is not a minor but of full age, is not guilty. In both cases, however, to excuse the guilt there must be no want of proper caution on the part of the accused. He must have used due diligence, according to the circumstances and the nature of the case. But if he do this, and the evidence show that after such caution he is still honestly mistaken, he is not guilty. We are not prepared to say that the evidence here is *conclusive* of an honest mistake. We do not say that the defendant was bound to have inquired of the parent. That would depend on his accessibility, and on the strength of the other circumstances indicating full age. It is impossible to lay down any general rule. Each case must depend on its own nature and circumstances. From the very nature of this offense special diligence is necessary. Everybody knows that there is uncertainty in such cases, and as the law has made the age of any billiard player important, even in spite of this liability to mistake, every saloon keeper should act in view of the fact that he is dealing with an uncertain thing. The man who throws a heavy weight from the top of a building is bound to a greater caution if he does it in a city or town, and into a street, than if he does it in the country, and into a little traveled road. As we have said, we do not think this evidence establishes conclusively that the defendant was honestly mistaken. We incline to the opinion of Judge RICE that there is some evidence to justify the finding, and had this conviction been by the verdict of a jury under a legal charge as to the law, we should hesitate to disturb it. But the record shows the county judge did not consider the question of intention; he acted on the idea, that as the proof was clear of minority, the law had been violated, whatever might have been the honest opinion of the defendant. He held him to be bound to inquire of the parent — nay, on the general rule he acted on, he, perhaps, would have found him guilty if he had inquired of the parent — had the parent, either by mistake, or untruthfully, answered that the son was of age. It appears, therefore, that on the trial of this case, the judge, who acted as judge and jury, mistook the law, did not consider the evidence going to show an honest mistake, after due caution, and we send the case back to be tried again under a proper view of the law, to wit: the defendant is not guilty, if, under all the circumstances, he honestly thought the young man not to be a minor, and the diligence required is that reasonable diligence which, in view of the nature of the case, a good citizen and prudent man would use.

Judgment reversed.

NOTE.—See *Reg. v. Prince*, L. B., 2 C. C. R. 154; S. C., 13 Moak's Eng. Rep. 385. The prisoner was indicted and convicted under a statute for unlawfully taking an unmarried

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girl under the age of sixteen out of the possession and against the will of her father. It was proved that the prisoner did take the girl and that she was under sixteen ; but that he *bona fide* believed and had reasonable ground for believing that she was over sixteen. *Held*, that the latter fact afforded no defense, and that the prisoner was rightly convicted.

MAHER v. STATE.

(53 Ga. 448.)

Criminal law — plea of former conviction — conviction in inferior court.

Defendant was indicted and held to bail in a superior court on the charge of keeping open a tippling-house on Sunday, April 4, 1873. Pending the indictment he was prosecuted and convicted in an inferior court for the same offense, charged to have been committed June 8, 1873. On the trial of the indictment he pleaded such conviction, and alleged that the indictment and the conviction were for one and the same offense. *Held*, that the plea was good.

INDICTMENT for keeping open a tippling-house on the Sabbath. The indictment was found in the Superior Court of Fulton county prior to June, 1873, and charged that defendant kept open a tippling-house on the 4th day of April preceding. Defendant gave bail. Afterward he was prosecuted and convicted in the city court of Atlanta, of keeping open such house on the 8th of June, 1873. Afterward on the trial of said indictment he pleaded the former conviction in the city court in bar alleging that the indictment was for the same offense.

Hillyer & Brother, for plaintiff in error.

John T. Glenn, for the State.

TRIPPE, J. On the hearing of the demurrer to the plea of former conviction, it was admitted by the solicitor-general that the offense with which the indictment charged the defendant was the same act and offense for which the conviction was previously had in the city court. It is not denied that the city court had jurisdiction over such misdemeanors. But the State claims that where an indictment is pending in the Superior Court, and the defendant has been arrested and given bond, he cannot, if afterward prosecuted and tried in the city court for the same offense — the same act — plead the judgment of the latter court in bar to the indictment in the Superior Court. The grounds relied on in support of this position are, that when there is an indictment in a Superior

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Court, under which the accused has been arrested, an inferior court has no jurisdiction to prosecute and try the defendant for the same offense, and that if jurisdiction existed, it is the duty of the defendant to plead the former indictment in bar of the proceedings in the inferior court, and a failure so to do is a fraud which disables him from pleading the judgment of the latter court to the indictment. If this position be true, what would have been the situation of the plaintiff in error? He was indicted in the Superior Court for keeping open a tippling-house on the 4th of April, 1873, the same being the Sabbath. He was prosecuted in the city court for committing the same offense, on the 8th day of June, 1873. No one can doubt that he could have committed the same offense on the two days charged, and that he could have been indicted and convicted of each. Had he been tried and convicted or acquitted, at the term of the Superior Court at which the indictment was found, he could not have pleaded the judgment against the accusation in the city court, unless he would go further, and show that the prosecution in the city court was for the identical act for which he had been tried in the Superior Court. The record would have been of no avail, unless supplemented by other proof. So if he had pleaded in the city court the pendency of the indictment in the Superior Court, the record would not have supported a plea that it was for one and the same offense. One would have been for an offense alleged to have been committed on the 4th of April, and the other for the same offense (same in character), but committed on the 8th of June. The first indictment was found in April, the latter prosecution instituted in August. So the record would not have availed him. Will it be said that he still should have pleaded the indictment to the accusation in the city court, so as to have been ready to sustain an objection at the trial in the city court, to any testimony going back to the period mentioned in that indictment, to wit: the 4th of May? The State was not bound to prove the day alleged in the indictment. It could prove that the offense was committed on any day prior to the finding of the bill, even since the day stated therein. The only limitation on its right in this respect is, that the proof must be of a day within the time prescribed by the statute of limitations. *Cook v. The State*, 11 Ga. 53; *Wingard & Ham v. The State*, 13 id. 396; *McBryde v. The State*, 34 id. 202.

So, then, the prosecutor in the Superior Court could have proven a day subsequent to the time mentioned in the bill of indictment, and if a defendant in the situation of this one, prosecuted in two courts for offenses, though similar in name, yet charged in the respective proceedings against him as two different acts, two different violations of the same law,

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committed on two different days, is bound on the trial of the last charge brought against him, to meet all these various rights and powers of the prosecution, it would often cast an *onus* upon him which would work a practical denial of his great constitutional right not to be put in jeopardy of life or liberty more than once for the same offense. If the two records or prosecutions showed on their face the identity of the offenses, the criminal acts, the practical hardship would not be so great upon a defendant. But we do not think that under the facts of this case plaintiff in error should have been denied his plea; and if he had been convicted and punished for the same misdemeanor in the city court, for which the State claimed the power to convict him again, his defense should have been allowed.

Outside of the special facts stated, as shown by the two proceedings, and the reasons thus far given for the decision we make in this case, and speaking for myself, I am not prepared to sustain either of the grounds upon which it is claimed that the demurrer to the plea should have been allowed. The city court had jurisdiction conferred by law to try this misdemeanor; so did the Superior Court. I can find no authority for the position that because an indictment has been instituted in one court which had jurisdiction over the offense, therefore any judgment of an other court with like jurisdiction, rendered in a prosecution commenced afterward for the same offense, *was void*. Perhaps the case of *Burdette v. The State*, 9 Tex. 43, is one decision to that effect. The judgment is put upon the principle that where there are two courts with concurrent jurisdiction, the one first exercising it acquires control of the case to the exclusion of the other. This is true to a certain extent; for a party, if sued in two actions for the same cause, at different terms or in different courts having jurisdiction, may plead the pendency of the first in defense of the second. Code, § 2894. But it will hardly be claimed that if a defendant were to fail so to plead, and judgment be taken against him in the second suit and is satisfied, he would be barred from pleading that fact to the first suit, if still pending. Such a failure on the part of a defendant does not give a plaintiff the right to two judgments and a payment of both. The principle was not intended to and does not oust the court in the second suit of jurisdiction, but its object and effect is to protect a party from two suits at the same time for the same cause of action. It is his duty not to let both judgments go against him. But if the plaintiff does, in fact, get a judgment in either, or a settlement and satisfaction of either and the other is pending, that fact may be pleaded against it. He cannot say his own proceedings, in which he has obtained satisfaction, are void, and therefore claim to be paid again. So a party accused of a

crime, if indicted for it in two courts having jurisdiction over the offense, may plead the pendency of the first against the second, not to show that the court in which the second is pending has no jurisdiction, but to give that court a reason why it should not exercise the jurisdiction over the offense, which, by law, it has. But if no such plea be filed, and the accused is tried and judgment rendered, it is not void, as is the judgment of a court having no jurisdiction. If the defendant is convicted and suffers the penalty, he can assert his right not to be punished twice for the same offense.

The head-note in the case of *Mize v. The State*, 49 Ga. 375, is "the plea of *autrefois convict* to an indictment for a misdemeanor in the Superior Court, may be sustained by proof of such former conviction before an inferior court having jurisdiction of the offense, unless it appear that such indictment was found prior to the prosecution in the inferior court, and that the defendant had been arrested under it." The qualification in the last clause does imply that if the indictment be first found, and the defendant has been arrested, the plea would not be sustained, and doubtless was so construed in making an application of it to this case. But speaking again for myself, I am inclined to the opinion that the principle announced would be good without the qualification. The facts of the case in which that decision was made sustain the judgment without requiring the addition of the proviso, for the record did not show that there had been any arrest.

But, really, can the matter of arresting or not arresting the defendant affect the question of jurisdiction? That is the point now being considered. The Superior Court has jurisdiction, as full and complete over the offense without an arrest, as well as where there is an arrest. The finding of an indictment is a commencement of a prosecution, an assertion of jurisdiction, as much so as if an arrest follows. And if the principle that the first of two courts, having concurrent jurisdiction, which exercises it, acquires control of the case to the exclusion of the other, means that the other court is thereby ousted of all jurisdiction, and its proceeding would be a nullity, then the same principle would apply in cases, whether there be an arrest or not, and the Texas decision is the rule in all cases of two prosecutions in two different courts. But the judgment in *Mize v. The State* is in conflict with that conclusion, and so are the two cases referred to in that decision from North Carolina. 2 Dev. & B. 159; Busbee. 209. See 1 Bish. Crim. Law, § 679, with notes and authorities cited. I know of no case going as far as the one in the Texas Reports.

As to the other ground taken in the argument, that the failure of de-

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endant to plead the pendency of the indictment was a fraud, no authority was read going to that extent. The cases in 1 N. H. 257; 11 H. L. 599; 1 Swan, 84, and others, were all cases in which it was held that the defendant had by fraud and collusion *procured the prosecution to be instituted against him*, which he afterward pleaded and relied on. In fact, it is said in some of those cases that the defendant had *managed such prosecution himself*, and that what he had thus procured by fraud he could not avail himself of by way of defense. But even in the case of *The State v. Little*, 1 N. H. 257, where it was held that the facts showed the defendant did conduct the prosecution against himself, and consequently could not plead the judgment therein, WOODBURY, J., said: "But when prosecutions before the higher courts are managed by the attorney-general, the solicitor, or counsel appointed by the judges, and before single magistrates, by similar counsel, or by the party aggrieved, or by disinterested individuals, such prosecutions can never, perhaps, be considered fraudulent, for such persons would be presumed to act with proper views, and when not express, might be deemed implied agents for the State.

One remark suggested by this extract: The solicitor-general of the Superior Court of Fulton county is, by law, the solicitor-general of the city court. It is true, in his absence there may be a solicitor-general *pro tem.* appointed by the court. This was done in this case. The State — the prosecutor — was represented in the city court by counsel appointed by the judge of that court. No act of fraud on the part of any one has been suggested. There was all the machinery of law — a judge, solicitor-general and jury. The power in the city court to punish the accused was ample. He was punished by a fine of \$150. In default of its payment, he was adjudged to do public work for six months. He ought not to be punished again, and cannot be, unless a rule of law, which does not mean what is claimed for it, overrides one of the most valuable constitutional rights which the citizen has.

Judgment reversed.

HIGHTOWER V. SLATON.

(54 Ga. 108.)

Attachment — garnishment of salary of public school teacher.

The salary of a teacher employed in a public school and paid by the city is not attachable by trustee process while in the hands of the city officials whose duty it is to pay it.

Hightower v. Slaton.

THE opinion states the case.

Hunt & Johnson, for plaintiffs in error.

Nunnally & Johnson, *Speer & Stewart* and *Peoples & Howell*, for defendants.

WARNER, C. J. The plaintiffs sued out a summons of garnishment, directed to Mangham, secretary and treasurer of the board of education of public schools in the city of Griffin, requiring him to appear at court and answer what he was indebted to Slaton, the plaintiffs' judgment debtor, or what property or effects he had in his hands belonging to him. On the hearing of the case in the Superior Court, the following facts were shown, as disclosed by the record. That Mangham, the garnishee, was secretary and treasurer of the board of education of the public schools in the city of Griffin, and in such official capacity he was indebted to Slaton, the defendant, the sum of \$162.25, subject to reduction on final settlement, the same being \$87.25, balance of salary for month of May, and \$125.50 for month of June; that Slaton was employed by said board of education as principal teacher in the "Sam. Baily Male Institute," for the scholastic year of ten months, in 1874, at a salary of \$125 per month, payable, by contract, at the end of each month; that the board had no right to discharge him except for cause; that Slaton had performed his service for the first term of the school for the year 1874, and the amount in the garnishee's hands admitted to be due was for service already performed. Upon this statement of facts the court decided that the salary of the defendant, Slaton, was not subject to the process of garnishment. Whereupon the plaintiffs excepted. By the 3554th section of the Code, it is declared that all journeymen, mechanics, and day laborers, shall be exempt from the process and liabilities of garnishment on their daily, weekly, or monthly wages, whether in the hands of their employers or others; provided, that the wages of no person in the employment of another shall be exempt from the process of garnishment when the consideration of the debt is for provisions for the use of the employee or his family, or when the consideration of said debt is for the board of himself or family. In giving a construction to this statute, in the case of *Carater v. Mathews*, 25 Ga. 571, this court held that the wages of an overseer employed for the year, at a fixed salary, which was to be paid daily or weekly, was exempt from the process of garnishment. It is difficult to say that a teacher in a private or public school, who faithfully per-

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form his or her duty, is not as much a day laborer, within the meaning of the statute, as an overseer. But we do not put our judgment in this case on that ground alone. The defendant, Slaton, was employed as a teacher in a public school, by the board of education of the city of Griffin, created by an act of the general assembly for the purpose of educating the children of that city, which board of education had authority to employ teachers, receive its *pro rata* share of the public school fund of the State, as well as such sums as might be raised by taxation, and to expend the same in establishing and maintaining public schools in said city. The defendant, Slaton, was employed by the board of education as a teacher, to promote the public interest, as contemplated by the act of the general assembly of the State, at a salary which was, by the contract, to be paid at the end of each month. Teachers in the public schools of the State, as a general thing, belong to that class of persons who are dependent on their earnings in that capacity for the support of themselves and families. There is no class of persons in the State whose services are more important to the welfare of the people thereof, than the industrious, competent teachers of the children of the country. But if their wages, on which they and their families are dependent for support, is liable to process of garnishment, the public will be deprived of their services, because they cannot afford to engage in a business which must necessarily, if they perform their duty, occupy their whole time, and they cannot labor in their vocation, without meat and bread and wherewithal to be clothed. The children of the State cannot be educated without competent teachers, and competent teachers cannot be obtained, if they are to be deprived of their wages for the support of themselves and families, by process of garnishment. Besides, if a judgment was rendered against the garnishee in this case, upon what property could it be enforced? The garnishee is the secretary and treasurer of the board of education, and would not be liable in his individual capacity. The public funds in his hands could not be seized, as it would be as much against public policy to do so, as to garnishee a municipal corporation for the salaries of its officers, which this court has held cannot be done. We therefore affirm the judgment of the court that the salary of the defendant, Slaton, was not subject to the process of garnishment, on the ground of public policy, he being a teacher in a public school institution of the State recognized by the general assembly as such.

Let the judgment of the court below be affirmed.

McLELLAN, plaintiff in error, v. YOUNG.

(54 Ga. 399.)

Attachment — of officials' salaries.

A municipal corporation is not liable to be garnished for the salaries of its officers, and this is true even if the debt claimed to be due from the officer is for provisions for himself and family.

McLELLAN recovered a judgment against **Young** on an account for provisions furnished to him and his family. Process of garnishment was served on the Mayor and City Council of Marietta. The defendant was an officer of said garnishee, being the marshal of the city of Marietta, receiving a salary of more than \$500 per annum, payable monthly. The garnishee was indebted to him as such officer.

The case was submitted to the court without the intervention of a jury. The garnishment was dismissed on the ground that the salary of an officer of a municipal corporation could not be reached by such process. To this ruling the plaintiff excepted.

W. T. & W. J. Winn, for plaintiff in error.

C. C. Winn and C. D. Phillips, for defendants.

McCAY, J. In the case of *Holt v. Experience*, 26 Ga. 113, this court decided that municipal corporations were not subject to garnishment for the salaries of their officers. So in 37 Ga. 240, it was held that the Western and Atlantic Railroad was not subject to be garnished for the salaries of its officers. Both of these cases go upon the idea of public policy. In both cases the officer was a public servant, selected to do a public duty, and that the public ought not to be thwarted or interfered with by contests with individuals as to the services of its officers. The exemption is not for the benefit of the officer, but because the public is not to be harassed and inconvenienced by petty suits in the shape of garnishments, and the efficiency of its servants interfered with by any uncertainty whether when the salary is due it will be paid. The act of 1850 recognizes this principle in that whilst it authorizes garnishments against corporations generally when the salary exceeds a certain amount, it expressly exempts municipal corporations. But this exemption was doubtless inserted simply to prevent misconception arising from the gen-

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eral use of the word "corporation" in the body of the act. The decision in 26 Ga. and in 37 id., on the subject of the exemption of municipal corporations from garnishment for the salaries of its officers, on principle, is sustained by the authorities in other States. Such is the rule in Pennsylvania. *Erie v. Knapp*, 29 Penn. St. 173. In Minnesota, 4 Minn. 184. In Vermont, 6 Vt. 121. In Wisconsin, 15 Wis. 193. In Massachusetts, 18 Grey, 200. In Missouri, 11 Mo. 59; 23 id. 239. In Connecticut, 11 Conn. 128. In Alabama, 38 Ala. 69. In Maryland, 8 Md. 95. Nor is there any thing in the act of 1872 which even suggests an intent to alter this rule. The act evidently contemplates persons who have wages due them and whose wages were *exempt* from garnishment under previous acts. The salary of a public officer is, in no fair sense of the word, wages. Such salaries were not exempt under acts exempting "wages." They were not, in the technical sense exempt at all, but for the convenience and protection of the public, the corporation was not liable to garnishment for the salaries of its officers. The protection was not to the officer but to the public, and was intended to prevent confusion and petty litigation, and to secure to the public the faithful and diligent performance of official duties by its officers. Besides, it would be giving a very broad and unusual meaning to the word "wages," as used in the act of 1872, to include in that term the salary of a public officer fixed by law. Not one person in ten would understand, by the word "wages," the salary of a public officer. We are not prepared, therefore, to say that it was the intent of the legislature, by the act of 1872, to make the salary of a public officer liable to garnishment in case the plaintiff's debt be for provisions. To do so we must hold that a well-settled rule of law has been altered by the legislature, although there are no words in the act to indicate such an intent, and although the original rule and the act of 1872 may both stand together. The corporation would not be liable to garnishment, as decided in the cases we have quoted, though there were no such exemptions as provided in section 3554 of the Code; and if this new liability is consistent with the absence of any exemptions, surely it is consistent with the act of 1872.

Judgment affirmed.

Ross, plaintiff in error, v. STATE.

(55 Ga. 192.)

Jurisdiction — of offenses against laws of United States

A State court has no jurisdiction of the offense of perjury committed before a United States commissioner during the investigation of a charge of violating the laws of the United States.

INDICTMENT for perjury. The opinion states the case.

H. & I. L. Fielder and L. S. Chaslain, for plaintiff in error.

James T. Flewellen, Solicitor-General, by *A. Hood*, for State.

WARNER, C. J. The defendant was indicted for the offense of "perjury" in the Superior Court of Randolph county, and on the trial therefor, the jury found him guilty. When the evidence on the part of the State was closed on the trial, the counsel for the defendant made a motion to quash the indictment and proceedings, and to discharge the defendant, on the ground that the alleged false oath was taken before a United States commissioner in the investigation before him of an alleged violation of a penal law of the United States, punishable by the courts of the United States, and that the Superior Court of Randolph county had no jurisdiction to try said case, which motion the court overruled, and the defendant excepted.

It appears from the evidence in the record, that the oath of the defendant on which the perjury was assigned, was taken before a United States commissioner on the investigation of a charge preferred before him for a violation of the enforcement act of Congress by one Kenney, and the question is whether the State court had *concurrent* jurisdiction with the Federal courts for the trial of the alleged offense, or whether the Federal courts had the *exclusive* jurisdiction for the trial thereof. The offense charged in the indictment is an offense against the public justice of the United States — and whatever may have been the conflicting decisions in the several courts of the United States in regard to the concurrent jurisdiction of the State courts in similar cases, prior to the adoption of the Revised Code of the statutes of the United States on the 20th of June, 1874, there is now no longer any room for doubt or discussion in relation to that question. By section 5392 of the Re-

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vised Statutes of the United States, it is declared that every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, etc., willfully and contrary to such oath, states any material matter which he does believe to be true, is guilty of perjury, and shall be punished, etc., and shall moreover thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. By the 629th section it is declared, that the Circuit Court of the United States shall have *exclusive* cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offenses cognizable therein. By the 711th section it is declared that the jurisdiction vested in the courts of the United States of all crimes and offenses cognizable under the authority of the United States, shall be *exclusive* of the courts of the several States. When a crime is committed against the public justice of the United States, the party charged therewith is to be indicted and prosecuted therefor in the courts of the United States, and not in the courts of the State. When a crime is committed against the public justice of this State, the party charged therewith should be indicted and prosecuted in the courts of this State, and not in the courts of the United States. In our judgment, the offense charged in the indictment contained in the record was an offense against the public justice of the United States, and not an offense against the public justice of this State, and therefore the Superior Court of Randolph county had no jurisdiction to try it, and the court erred in not sustaining the defendant's motion to quash the indictment and proceedings had thereon, and to discharge the defendant therefrom.

Let the judgment of the court below be reversed.

HEINEMAN v. NEWMAN.

(55 Ga. 262.)

Fraud. — action for price of goods sold to defraud creditors.

In an action for the price of goods sold and delivered, the defense was interposed that the sale was for the purpose of defrauding plaintiff's creditors. *Held*, that the defense being made out, the plaintiff could not recover.

Heineman v. Newman.

ACTION on an account for goods sold. The opinion states the case.

Wright & Pope, for plaintiff in error.

Strozer & Smith, for defendant.

JACKSON, J. This suit was brought on an open account. The account was proved to be correct. The defense was that the goods were sold to defendant to defraud creditors, and the single question submitted to us is, whether such an amount can be collected. The court charged the jury that "if plaintiff sold the goods to defendant with a view to defraud his, plaintiff's, creditors, then the law will not aid him to collect his debt, but will leave him, plaintiff, where it finds him." The sole question is, does this charge give the law of the case correctly?

This general question first came before this court in the case of *Howell v. Fountain*, 3 Kelley, 176, and was most elaborately argued and decided by Judge NISBET. Numerous authorities are cited to sustain the conclusions to which the court comes, and that conclusion is embodied in these words: "Courts of justice will not lend their aid to enforce an illegal or immoral contract; if it be executed they will not disturb it, but leave the parties where they find them. No action can be maintained upon an immoral or illegal transaction, when the transaction was not subsequent or collateral, but directly connected with the unlawful act."

The question again arose in the case of *Peacock v. Terry*, in 9 Ga. 181, and in the case of *Gault v. Jackson*, 9 Ga. 151, where, in equity, the same principle is substantially announced. Again, in 19 Ga. 290, in the case of *Crosby v. De Graffenreid*, it was held that, where A, to defraud his creditors, transfers his property to B and dies; his administrator files a bill against B to get possession of his property, that he may with it pay creditors, there is no equity in the bill, that is, the law will leave the parties where it finds them. It is true, there are some remarks of Judge BENNING, in delivering the opinion, which seem to sustain the views of the plaintiff in error here; but they are not in conflict, we think, with the idea that the courts will remain passive, and will not interfere to aid either party to such a transaction. So in 20 Ga. 600, there are some words of Chief Justice LOMPkin to the effect that a contract is good between the parties themselves, though bad as to creditors defrauded. But we nowhere find a case where the courts will aid one party to such a contract to enforce it against the other. The principle laid down by Judge NISBET in 3 Kelley has never been overruled. This contract was illegal certainly as to the creditors defrauded, and grossly immoral as be-

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tween the parties to it, and courts of justice will not touch it at all, but leave the parties just where they find them. See 1 Fairf. 71; 20 Wend. 24; 4 Hill, 424; 10 Yerg. 228; 1 Mees. & W. 159, 166; 1 Am. Lead. Cas 45

Judgment affirmed.

NOLAN V. STATE.

(55 Ga. 521.)

Criminal law — mistrial — discharge of jury in absence of prisoner — autrefois convict.

Upon the trial of an indictment for murder, a verdict of guilty was received and the jury discharged, in the absence of the prisoner, who was confined in jail. The verdict was for such irregularity set aside on defendant's motion, and the defendant was again arraigned for trial upon the same indictment. *Held*, that he had been once in jeopardy and could not be tried again for the same offense.

INDICTMENT for murder. Upon the trial evidence was submitted to a jury regularly impaneled, argument had, and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manslaughter, and were discharged. The defendant, at a subsequent term, moved that said verdict be set aside on the ground that it was rendered and published in his absence and without his right of being present having been waived. The court ordered accordingly.

The defendant was subsequently arraigned the second time upon the same indictment, when he pleaded specially in bar the aforesaid facts as constituting his having been placed once in jeopardy, and claimed his discharge. This plea was overruled by the court, and defendant excepted.

A verdict finding the defendant guilty of voluntary manslaughter was returned.

Error is assigned upon the above ground of exception.

S. B. Adams & A. P. Adams, for plaintiff in error.

A. R. Lamar, Solicitor-General, by *Walter G. Charlton*, for State.

BLECKLEY, J. Without restating the specific propositions embraced in the head-notes,* some observations will be added on the general topic.

One trial, and only one, for each crime is a fundamental principle in criminal procedure, and must be the general rule practically administered in all free countries. For the public authority, whether king or commonwealth, to try the same person over and over again for the same offense, would be rank tyranny. It would amount, in capital cases, to cruelty not unlike that of keeping a loaded repeater pointed at the prisoner's head, and, with deadly purpose, but bad aim, discharging slowly one cartridge after another. Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment upon a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few and strictly guarded.

Where a first trial is complete, and its result, whether conviction or acquittal, left to stand, there is little or no room for any diversity of opinion on its sufficiency to bar a second. In such a case the ordinary plea of former conviction or of former acquittal is applicable, in terms, and would be upheld by all courts alike. But we reach debatable ground when we come to those cases in which trials have been begun but not ended; and some others, in which the endings have been ineffectual because irregular or wholly void. Courts are not fully agreed where

* The head-notes which were prepared by the judge are as follows :

1. When the accused is put on his trial for a capital offense, and the jury sworn and charged, if the indictment is not defective, he is in jeopardy of his life. 3 Kelly, 63.

2. Two reasons only are recognized by the law as justifying the discharge of the jury before they have agreed upon a verdict and legally returned it into court, to wit: the prisoner's consent, or necessity in some of its various forms, one of which is mistrial. 14 Ga. 426 ; 13 id. 353 ; 23 id. 1 ; 33 id. 329 ; 3 Kelly, 53 ; 2 id. 60.

3. There being no authority of law for receiving a verdict of guilty and discharging the jury, without the prisoner's consent and without necessity, whilst he is absent involuntarily from the court, confined in jail, to do so is to deny him the right of having the voice of his jury authentically pronounced upon his guilt or innocence.

4. A verdict so received, having been, on his motion, set aside as illegal, when afterward arraigned for trial on the same indictment for the offense before another jury, the prisoner may plead specially his former jeopardy in bar of a second trial, and if supported by the record and the extrinsic facts, the plea should be sustained, and, thereupon, the prisoner should be discharged.

5. His motion to set aside the verdict for such cause is distinguishable from a motion for a new trial, and consequently does not subject him to be again put in jeopardy as though a new trial had been applied for and granted. In the present case a new trial was not a necessary incident of setting aside the verdict, and in point of fact was neither applied for by the party nor expressly ordered by the court. The former jeopardy is clear and the prisoner's claim to protection comes within the declaration of fundamental principles in the Constitution of 1868. Code, § 5000.

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jeopardy begins, or how far the defense of once in jeopardy differs, if at all, under our American constitutions, from that of *autrefois convict* or *autrefois acquit*, under the English common law. In the view of some judges jeopardy arises not out of the trial but out of the verdict; as if, in a combat intended to be mortal, there was no danger of being slain until you are hit.

The former decisions of this court have tended always to treat a jury, when impaneled, sworn and charged with the case, as the consecrated body of peers whose individual minds and personal consciences are laden with the prisoner's destiny. Not a jury, simply, but *this* jury, are to pronounce upon his guilt or innocence. They, and they alone, are to pass between the State and the prisoner, and arbitrate the grave matter in dispute. Their decisions may or may not be final as against the prisoner, but it will conclude the State forever, unless annulled at his instance. Though he may avoid it for any material error committed against him, the State cannot avoid it at all, but is bound by it irrevocably, so long as he suffers it to stand. He has a right to have it made up and legally returned into court, so that he may, if it suits him, accept it. A verdict, on this trial and from this particular jury, not on some future trial before another jury, is what he may demand, and what the State, subject only to obstacles amounting to legal necessity, undertakes to afford: "What say you, gentlemen of *this* jury, am I guilty or not guilty?" To this question he is entitled to an answer, if to obtain it be within the compass of legal possibility. He takes the risk of its being adverse, and may claim whatever chance there is of its being favorable. The fear of the situation is upon him, and he is entitled to its hopes also. Condemnation or deliverance, here and now, is the one alternative. Only with his consent, or for some legal necessity, can the crisis be ended whilst the voice of his jury remains undeclared.

What amounts to such a legal necessity as will justify the discharge of a jury without a verdict, is a subject on which courts have widely differed. *Wright v. State*, 5 Ind. 290; *Miller v. State*, 8 id. 325; *State v. Wamire*, 13 id. 357; *Dobbins v. State*, 14 Ohio St. 493; *Atkins v. State*, 16 Ark. 568; *Poage v. State*, 3 Ohio, 229; *State v. Walker*, 26 Ind. 346, 493. The tendency, of late, has been to lower the standard so as to comprehend moral as well as physical necessity, and in the region of the moral, to be content with very moderate tests. See the cases cited in the syllabus. Mistrial, from inability of the jury to agree, is clearly within the principle. So, too, in the case of voluntary absence by the prisoner when he ought to be present; and upon this theory the cases in *Andrews v. State*, 2 Sneed, 550, and *State v. Battle*, 7 Ala. 259, can be

upheld. But we think no possible expansion of the rule can include the return of a verdict during the enforced absence of the accused by imprisonment, and the discharge of the jury as consequent thereupon. It is not quite clear from the report that the case in *State v. Hughes*, 2 Ala. 102, was one of that kind, for the cause of the prisoner's absence is not expressly stated. His counsel were present, and made no request that he should be present. The Supreme Court, after ruling that judgment should be arrested, proceeded to the consideration of what further order should be made in the case; and the order made was that the prisoner remains in custody to await a trial *de novo*. The facts were treated as in all respects like those in *The People v. Perkins*, 1 Wend. 91, in which latter case the prisoner was confined in jail when the verdict was received. No other authority is cited by the Alabama court, and we think *The People v. Perkins* is not a satisfactory authority upon the point now in question. The direct point of judgment in that case was, whether the prisoner could be sentenced upon a verdict received while he was confined in jail. It was held that he could not; and the court went on to *advise* that the verdict be set aside, and that there be a new trial. This advice, to be recognized as settled law in favor of the proposition that the prisoner was subject to a second trial, ought, at least, to be shown to have been followed by a second trial; but no such fact appears. If a second trial had taken place, and the plea of former jeopardy overruled, whether the reviewing court, in passing upon the plea, would have administered to the actual case, the substance of its own advice, as law, we do not know. In 16 La. Ann. 400, is a case of misdemeanor, on the line of trying the prisoner over, whenever the first verdict was quashed. There the verdict was recorded in the French language, contrary to a statute which required it to be recorded in English on pain of absolute nullity. From a Georgia standpoint, the remedy for omitting to record the verdict in proper time and manner, would be, not a second trial, but an entry on the record, *nunc pro tunc*. In that case, however, the plea made no complaint of discharging the jury, but was simply a plea of former conviction, which was, of course, unsupported by a record in the French language, since, according to the statute, no verdict not recorded in English could be recognized.

In the case before us, the prisoner does not stand upon a former verdict but upon former jeopardy. His complaint is, that his case was given to a jury and never legally withdrawn. What that jury thought of his guilt or innocence has not been authentically declared; and the jury having been discharged, in his enforced absence and without his consent, their opinion of his guilt or innocence can never be legally known. For

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ought that appears, every member of that jury was ready to acquit him. His defense before it may have been complete and triumphant. The error of receiving a formal verdict in the prisoner's absence would be nothing, if the jury had been retained in the box and required to render a valid one in his presence. The mischief was done by discharging the jury without any legal necessity, and without obtaining from it something that the law could recognize as a verdict. The prisoner was once fully in the power of that jury, and he had a right to such a verdict as each several juror could avow before his face. Many years ago, in the county of Fayette, I witnessed the polling of a jury, on the return of a verdict of guilty, where the eleven jurors first called declared the verdict to be theirs, and only the twelfth man disowned it. The result was, that on reconsidering the case, the whole twelve agreed to a verdict of not guilty, and the prisoner was acquitted.

The motion to set aside the verdict in the case at bar was made after the denial of a motion in arrest of judgment: see 53 Ga. 137; and the State contends that such a motion is equivalent to an application for a new trial. 30 Ga. 191. This is an effort to draw the prisoner into a second jeopardy as the price of escaping from the first. It is hard enough to pay the price where a new trial is actually moved for and granted. We think such a traffic in jeopardies is not to be considered as conducted by implication. The bill of rights declares that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in case of mistrial. Code, § 5000.

Judgment reversed.

JOHNSON V. JACKSON.

(53 Ga. 323.)

Administrators — jurisdiction of actions against.

An administrator appointed in Alabama and the sureties on his bond there given became residents of Georgia. *Held*, that they were liable to an action in Georgia by the distributees for a breach of the bond.

Seemle, if foreign executors or administrators come within the jurisdictional limits of a State, they are liable to be sued there by creditors, or to be brought to an account by legatees or distributees.

ACTION against the principal and sureties on an administrator's bond. The opinion states the case.

B. H. Bigham and Jackson & Lumpkin, for plaintiffs in error.

F. M. Longley, for defendants.

WARNER, C. J. This was an action brought by the plaintiffs as the heirs and distributees of H. T. Erwin, deceased, against Wyche S. Jackson, administrator of said Erwin, and his securities on his administration bond, in the county of Troup, all the defendants being alleged to be of said county, except Jones, who is alleged to be of the county of Baker in this State. The plaintiffs allege in their declaration that Jackson was appointed administrator on Erwin's estate by the Probate Court of Chambers county, in the State of Alabama, in the year 1859, and then and there the defendants executed the bond sued on, conditioned for the faithful performance of his duty as such administrator. The plaintiffs also allege that as such administrator he possessed himself of the estate of said Erwin of the value of \$75,000, and has wasted and appropriated the same to his own use. The plaintiffs also allege that they brought suit in the Superior Court of Troup county against said Jackson, as administrator aforesaid, for an account and settlement, and obtained a decree against him for the sum of \$1,596.95, besides interest and costs, in that court; that no part of said decree has been paid; that a *fieri facias* has been issued thereon, and a return of *nulla bona* has been made thereon by the sheriff of Troup county; all of which the plaintiffs allege as a breach of his bond, and now seek to recover the amount of said decree from the defendant and his securities on his aforesaid administration bond. The defendants demurred to the plaintiff's declaration, and made a motion to dismiss the plaintiffs' action on the ground that the Superior Court of Troup county had no jurisdiction of the case, which demurrer and motion the court sustained, and the plaintiffs excepted.

There was no point made that the defendants had not been regularly served with process as required by the laws of this State.

1. The question made and insisted on here was, that the court had no jurisdiction of the case because the administrator had been appointed by the Probate Court of the State of Alabama, and that the bond sued on had been taken by that court in that State, and must be sued on there, and could not be sued on in the courts of this State, although the defendants might be personally liable to be sued here. Whatever may have been the decisions of the other courts in relation to the question of jurisdiction in this class of cases (and it is conceded they are conflicting), still, if it was an original question in this court, I should hold

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that it was controlled by the Constitution and laws of this State, so far as our own courts are concerned. By the Constitution, the Superior Courts of this State have jurisdiction of all civil cases, except as therein otherwise provided. The sovereignty and jurisdiction of the State, and the laws thereof, extend to all persons while within its limits, whether as citizens, denizens or temporary sojourners. Code, § 21. A citizen of another State passing through this State may be sued in any county thereof in which he may happen to be at the time when sued. Code, § 8416. The provisions of the law are general and include executors and administrators as well as all other persons; there is no exception made in favor of executors and administrators, or securities on their bonds. If they come within the jurisdictional limits of the State, they may be sued in any county in the State in which they may happen to be at the time when sued. The policy of the State is to furnish her own people with a remedy to recover their rights in her own courts, without compelling them to go into a foreign jurisdiction to obtain their lawful and just claims. These principles were fully recognized by this court in *Maxwell v. Seymour, Fannin & Company*, 30 Ga. 440, in which it was held that all persons within the limits of a government, whether their residence be deemed permanent or temporary, are to be deemed so far citizens or subjects thereof, as that the right of jurisdiction, civil and criminal, will attach to such persons.

2. When a foreign executor or administrator is sued in the courts of this State, the nature and extent of his liability will depend upon the laws of the State or country where he derived his authority to administer the assets of the decedent. The assets of the deceased should be applied in the payment of debts, or be distributed among the next of kin, by our own courts, according to the law of that State or country, in the same manner as if the executor or administrator had been sued and called on to account in the courts of that State or country, and that is the comity of States as recognized by the ninth section of the Code. Why should the distributees of the deceased, who are citizens of this State, be compelled to go into the foreign State of Alabama to obtain their rights, when the courts of this State can afford them the same redress as the courts of that State? Should the courts of this State presume that the courts of Alabama are more competent to administer the law applicable to the case, and send the plaintiffs there for that reason? When a foreign executor or administrator comes within the jurisdictional limits of this State, he is, in my judgment, liable to be sued here by the distributees of the estate which he represents, and to be made liable to the same extent as he would be liable according to the laws of the

State in which he was appointed, and not otherwise. In what I have said, I have only expressed my individual opinion, and not that of the court.

3. But assuming the general rule to be, that an executor or administrator cannot be sued out of the State in which he was appointed, the special facts of this case, in our judgment, take it out of that general rule. It appears from the allegations in the plaintiff's declaration, that Jackson, the administrator, has been sued by the plaintiffs and called on to account in that capacity, in the Superior Court of this State, and a decree rendered against him establishing the fact that he has wasted and appropriated to his own use the assets of his intestate's estate, to the amount of \$1,596.95. The plaintiffs also allege that the defendants are all residents of this State. The 2034th section of the Revised Code of Alabama declares that "any bond given by executors or administrators, as such, may be sued or proceeded on in the name of any party aggrieved, until the whole penalty is exhausted." The plaintiffs have been aggrieved as they allege by a breach of the administrator's bond, and seek their remedy thereon against the defendants, who are alleged to be residents here, in the courts of this State. The 3250th section of our Code declares that for every right there shall be a remedy, and every court having jurisdiction of the one, may, if necessary, frame the other. That the plaintiffs have a right to recover against the defendants, according to the allegations, in their declaration, in some court, is indisputably true. They cannot sue the defendants in Alabama for the simple reason, as it appears on the face of the plaintiff's declaration, that they are not there to be sued, but are residents in this State where they are sued. It was suggested on the argument, that to allow the defendants to be sued in this State and a recovery had against them here, would have the effect to withdraw the assets of the estate from the State of Alabama, and defeat the claims of creditors there. The reply to that suggestion is, that the plaintiffs, as distributees, would not be entitled to recover in the courts of this State any more than they would in the courts of Alabama, until all the intestate's debts were paid, and the decree rendered against him, as set forth in the plaintiff's declaration, established the fact so far as the administrator himself is concerned, that he has wasted and appropriated to his own use the sum of \$1,596.95 after the payment of his intestate's debts, which amount the plaintiffs are now seeking to recover from the administrator and his securities on his administration bond, in the courts of this State, of which the defendants are residents, as appears on the face of the plaintiffs' declaration, and which was demurred to for want of jurisdiction. It appears on the face of the plain-

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tiffs' declaration, that the administrator and his securities were within the jurisdiction of this State, and that the administrator has in his own pocket, or is presumed to have, the sum of \$1,596.95, belonging to said estate, which he has wasted and appropriated to his own use, and to which the plaintiffs are entitled as distributees of the deceased intestate. In our judgment, the court erred in sustaining the defendants' demurrer for want of jurisdiction of the court and in dismissing the plaintiffs' action.

Let the judgment of the court below be reversed.

DESVERGERS v. WILLIS.

(56 Ga. 515.)

Covenant — incumbrance — highway is not.

A covenant against incumbrances in a deed of land is not broken by the existence of a public road over the land known to the purchasers at the time of the purchase.

ACTION on a promissory note. The opinion states the case.

Rufus E. Lester, for plaintiffs in error.

Howell & Denmark, for defendant.

WARNER, C. J. The plaintiff, as the administrator of W. F. Willis, sued the defendants on a promissory note given by them to his intestate for the sum of \$833.33. The defendants pleaded that the note was given for a part of the purchase-money of a certain described tract of land purchased by them of the plaintiff's intestate in his life-time, who, by his deed of conveyance of said land to them, covenanted and warranted the title thereto to be free and discharged of, and from all manner of incumbrances whatsoever. The defendants allege that said covenant was broken in this, that at the time of making said deed the said bargained premises were not free from incumbrances, but on the contrary, before the making of said deed, for a long time, there had been, and then was, and ever since hath been, a public road running through said land, to the use of which road the public generally had at that time acquired, and have continued to exercise, this right, which defendants are unable to prevent, to

their damage, \$1,000. The jury, under the charge of the court, found a verdict for the plaintiff for the full amount of the note. The defendants made a motion for a new trial on the several grounds therein set forth, which the court overruled, and the defendants excepted.

The court charged the jury "that if the defendants knew, at the time of the purchase of the land, that there was a road existing upon it, either a public or a private road, they cannot avail themselves of the warranty against incumbrances." A general warranty of title to land against the claims of all persons includes in itself covenant of a right to sell, and of quiet enjoyment and of freedom from incumbrances. Code, § 2608. The question made by the record in this case is, whether a public road on the land, which fact was known to the purchaser at the time of his purchase, is, in this State, a breach of a covenant of warranty against incumbrances? The decisions of the courts of this country are not uniform upon this question, but the weight of authority, we think, is that the existence of a public road on the land, known to the purchaser, is not such an incumbrance as would constitute a breach of the covenant of warranty. This view of the question is sustained by the better reason, especially as applicable to the condition of the people of this State. To hold that a public road running through a tract of land, which was known to the purchaser at the time of his purchase thereof, is such an incumbrance on the land as would constitute a breach of a covenant of warranty against incumbrances, would produce a crop of litigation in this State that would be almost interminable. It is true that the court charged the jury if there was a private road on the land, that would not be a breach of the warranty against incumbrances, but that part of the charge did not hurt the defendants, inasmuch as they admitted in their plea that the road on the land in controversy was a public road. Whether a private road on land would be a breach of a covenant of warranty against incumbrances, we express no opinion. The court submitted the question as to the fraudulent representations made by the vendor to the jury, and they have passed upon it. If the evidence had clearly shown that it was the intention of the parties at the time of the purchase of the land that the defendants would have the right to stop up the road, and that the warranty was made expressly in view of that fact, it would have presented a different question. The only evidence in the record on that point is that Willis told Richards (who was Willis' agent to show the land to any one who might desire to look at it with a view to purchase) that he might run his fence across the road, that it was only there for convenience, and that he told one of the defendants when he came to look at the land what Willis had told him, that any one purchasing the land might close

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up the road. In view of the evidence disclosed in the record, and the charge of the court applicable thereto, we find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

NOTE.—Compare *Beach v. Miller* (51 Ill. 206), 2 Am. Rep. 290; *Kellogg v. Matin* (50 Mo. 496), 11 Id. 426 and note; *Bark v. Hill* (48 Ind. 52), 17 Id. 781.

CASES
IN THE
S U P R E M E C O U R T
OF
FLORIDA.

FINNEGAN v. CITY OF FERNANDINA.

(15 Fla. 379.)

Tax — not the subject of set-off — enjoining collection of tax.

A person lawfully taxed by a municipal corporation cannot set off a debt due him from the corporation against the tax ; nor will equity enjoin the collection of the tax until the debt is paid ; nor because of a failure to recover the debt through the ordinary legal remedies ; nor because of irregularities in the notice of time and place of sale.

BILL in equity to restrain the sale of complainant's lands to satisfy a tax. The bill alleged that the complainant was the lawful owner and holder of the bond of the city of Fernandina for the sum of \$3,300 ; that said bond was past due ; that the city had refused and neglected to pay it ; that he procured a mandamus requiring the city to pay said bond and the interest thereon ; that the city had paid a small part thereof but that by various devices and through the leniency of the court the city had failed to carry out the order of the court in the matter of levying and collecting taxes to pay his debt and had refused to comply with the order of the court.

The bill further alleged that the city had levied a tax on complainant's property amounting to \$121 ; that he had proposed to the city to offset that sum against a part of his debt but that the city had refused ; that on the 28th February, A. D. 1874, the clerk of the said city inserted an advertisement in the "Fernandina Observer," in which he gave notice that he would sell on Monday, the 23d day of March, 1874, within the legal hours of sale, before the court-house door in the city of Fernandina,

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his said lots, or so much thereof as would pay the city taxes thereon for the year 1873, with costs. That subsequent to the said 28th day of February, this notice was changed as to the day of sale so as to read the 6th day of April, A. D. 1874. The said notice was not in compliance with law, and that said clerk had no authority, under the law, to advertise or sell property to enforce the payment of city taxes. That the individuals composing the city government were insolvent. That unless relief was extended to him as prayed, he is remediless.

Plaintiff prayed that the clerk may be enjoined from selling, from advertising and from offering to sell his said lots, either on the 6th of April, A. D. 1874, or at any other time or place, to pay the city taxes for the year 1873. That the city of Fernandina and its officers may be enjoined from collecting city taxes from him until the city shall have paid and discharged the full amount of his debt, principal and interest, accrued and to accrue thereon, with costs, as required by the writ of mandamus against the city.

To this bill the defendant interposed a demurrer. The grounds of the demurrer were :

First. Under the Constitution and laws of the State of Florida the municipal corporation, known as the city of Fernandina in 1860, is dissolved.

Second. That the city of Fernandina received no consideration for the alleged debt.

There was final judgment for the defendant upon this demurrer.

Upon this appeal the appellant seeks a reversal of the judgment upon two grounds—

First. Because the demurrer states facts that do not appear on the face of the bill ; that it is a speaking demurrer.

Second. Because the facts stated in the demurrer furnish no defense to the case made by the bill.

Fleming & Daniel, for appellant.

Friend & Hammond, for appellees.

WESTCOTT, J. This cause was heard in the Circuit Court upon demurrer to the bill of complaint. The principal question discussed in this court was the dissolution of the municipal corporation of the city of Fernandina. The view we take of the case renders it unnecessary to examine that question. There is no equity in the bill, and consequently the decree of the Circuit Court dismissing the bill was correct. There are

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three questions presented by the facts set up in the bill. These questions are :

First. Will a court of equity enjoin the collection of taxes by a municipal corporation from the property of its creditor, until the debt due by the corporation to such creditor is paid? Will it set off such debt against the tax?

Second. Will a court of equity enjoin the sale of property for taxes on account of irregularities in the matter of notice of time and place of sale?

Third. Will the failure to recover a debt through the ordinary legal remedies justify a court of equity in devising some method to accomplish that end?

To the first question : The amount which the citizen pays to the government through taxation is not regarded as the settlement of a simple contract or matter of indebtedness, capable of being accurately estimated in value in the same manner as an ordinary indebtedness existing between individuals. A public use, a public benefit to all and to each, is one of the essential ends sought to be obtained through such taxation. The public good, through the instrumentality of local municipal governments, exercising political, governmental and civil powers and functions, is the object sought to be attained, and the power of taxation is an essential means given to reach this end. A court of equity should not assume such powers as would, in any event, embarrass the attainment of these ends by the corporation. To enjoin the collection of municipal taxes due upon property owned by individuals, to the extent that there is a debt from the city to such individuals, is the exercise of a power of appropriation and interference with public trusts and the exercise of delegated sovereign powers which has not received the sanction of any court. The amount of the tax is not strictly a debt due by the person. Its collection is enforced without suit, and in many other respects there is a difference. (7 Wall. 80.) It is a burden imposed upon property, the return for which it is presumed the tax payer receives in the matter of benefit through police regulations and other results incident to municipal government. The exact amount of benefit which each citizen receives from the exercise of such powers is not the subject of precise calculation. Taxes and public revenues are not subject to executions against municipal corporations. Upon the same principle, salaries due officers of municipal corporations are not, in general, subject to garnishment. As a matter of abstract right and morality, it is unquestionably true that all property and funds of a debtor, whether it be a corporation or an individual, should be subject to compulsory process at the suit of the creditor, and

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this is the general theory of the law. Even this rule, however, is subject to many exceptions, such as exemptions allowed from motives of public policy. In the matter of municipal revenues and taxes, the rule at law is that they are exempt from execution, unless by statute they are made so liable. The same principle which exempts them at law would not permit a court of equity to allow a creditor to set off his debt against his taxes. To this extent a court of equity would be administering the general revenues of the corporation and assuming municipal discretions. There is no lien upon the fund to be enforced; and there is no trust in connection with the debt, unless the general abstract power and duty to tax to pay debts is itself a trust. This is no more a trust than the duty and power of every individual who has funds to pay debts is a trust.

In treating of the matter of set-off and taxation, the Supreme Court of New Jersey remarks: "Debt is the subject-matter of set-off, and is liable to set-off; a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government, and destructive of the very end of taxation." 2 Dutch. 399; 3 Metc. 526; 26 Vt. 486.

The next question is, will a court of equity enjoin the sale of property for taxes on account of irregularities in the matter of notice of time and place of sale? If the tax is due—and that such is the case is not here denied—the party should pay it. A court of equity will not aid him in resisting the just and legal demands of the government. It will not step in, for such reasons, and protect a party in not paying a tax which he admits is due. This is a very familiar principle, obtaining in all of the states.

The only other question remaining is, will a court of equity, on account of the failure of the *mandamus* proceeding, devise some method to enforce payment of the debt?

Substantially, this proposition was considered by the Supreme Court of the United States in the cases of *Rees v. The City of Watertown*, 19 Wall. 107, and the case of *Heine v. The Levee Commissioners*, id. 658. It is held in these cases that the failure of the ordinary legal remedy does not confer any jurisdiction upon the Court of Chancery. Because the proceeding has not been used at law with sufficient success by the plaintiff to secure his debt, cannot justify a court of equity in devising some method to accomplish that end.

The judgment is affirmed.

BIRD v. BIRD.

(15 Fla. 424.)

Tenants in common — exclusive occupation by one tenant — interest in crops grown on common property.

Where one tenant in common occupies and cultivates the common estate, to the exclusion of his co-tenants, the latter have a right to an account of the profits of the crops produced, but no property in the crops; and therefore a mortgage of such crops by the occupying tenant is good against his co-tenants and the mortgagee is not liable to account to them.

THE opinion states the case.

Pasco & Scott, for appellants.

George P. Raney and *J. W. Malone*, for W. C. Bird.

Papy & Raney, for respondents.

WESTCOTT, J. The appeal in this case is from two decrees of the Chancellor—one final, the other interlocutory. The final decree, from which the appeal is taken, dismisses the bill as to the defendants, Earle and Perkins, and this action is the general error assigned as to that decree. The interlocutory decree which the appeal brings here for review directs the commissioners appointed to partition the lands to assign to defendant, W. C. Bird, in the partition prayed for, that portion of the land which embraces the homestead of the family; directs an account to be taken of the rents and profits of the land which has been in the possession of W. C. Bird, and revokes the order restraining Bird from disposing of the crops.

Defendant, W. C. Bird, takes no appeal from that portion of the interlocutory decree which directs an account to be taken of the rents and profits received by him, nor do the appellants here present that question. It is, therefore, not before us for consideration.

The two general questions presented are: was the decree dismissing this bill, as to Earle and Perkins, error? Was the interlocutory decree erroneous in so far as it directed the commissioners, in making the partition, to assign to W. C. Bird the portion upon which was located the family homestead, and in so far as it restrained W. C. Bird from disposing of the crops?

Upon the death of Daniel Bird, in the year 1867, the plaintiffs, chil-

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decei. of Daniel B. Bird, and grandchildren of Daniel Bird, became entitled to one-third interest in a tract of land in Jefferson county; the plaintiffs, children of Pickens B. Bird, and grandchildren of Daniel Bird, became entitled to one-third interest; and the defendant, W. C. Bird, the son of Daniel Bird, became entitled to the remaining third. They were tenants in common.

At the death of the grandfather, W. C. Bird was in possession of the entire tract, and has so remained up to this time, with the exception of the year 1874. As to this year, the plaintiffs allege an entire and exclusive possession, while Bird answers that he has cultivated only a part for that year, and that he has been willing for the others to occupy. Up to 1874, it is admitted that he occupied and used the entire tract, appropriating the rents, issues and profits thereof. During this period Earle & Perkins, commission merchants, advanced to him moneys, taking mortgages upon his crops from year to year, to secure the repayment of the sums so advanced; and the defendant, Bird, in compliance with his contract, turned over his crops annually to Earle & Perkins, who sold them and applied the proceeds to the payment of the indebtedness of Bird to them.

The original bill was filed in 1869 against defendant, W. C. Bird, and its prayer was for a partition and account of the rents and profits. In June, 1870, the plaintiffs agreed to sell their interests in the land to the defendant, and the court after ascertaining the values in accordance with the agreement, on the 27th day of May, 1872, appointed a referee and directed a sale upon the terms agreed upon. On the 10th of May, 1873, the referee reported to the court a failure on the part of defendant, Bird, to comply with the agreement of the sale, and requested further instructions, or that he be discharged. The court took no action upon this report.

On the 17th day of February, A. D. 1873, defendant, Bird, executed a mortgage upon all the crops of cotton, corn, and fodder to be raised by him during that year. This mortgage was conditioned to pay advances for the crops for that year, and to apply any remaining balance to the debt due them by him for antecedent advances.

It will be seen that this mortgage was given while Bird was in possession, under a contract of purchase from the plaintiffs, which had been agreed to by them, and which had been approved by the court.

A receiver was appointed of these crops of 1873, by the court, in another suit, wherein Earle & Perkins sought a foreclosure of their mortgage, and the proceeds of the sales thereof are now under the control of the court.

Under this state of facts, the claim now here made is, that defendant, W. C. Bird, having controlled the interests of the infant plaintiffs in this land since 1867, is liable to them as trustee or guardian, and that defendants, Earle & Perkins, having received all of the crops raised thereon, are likewise liable as trustees, and that they should be decreed to account therefor. The precise question, therefore, which we have to determine is: Is the mortgagee of crops grown by one tenant in common of the land, who has possession of the entire estate, responsible as trustee to other infant tenants in common of the land with the mortgagor, such mortgagee having received the crops and appropriated the same to the payment of his mortgage debt?

Appellants insist that the infant tenants in common had a property and title in the crops grown by their co-tenant to the extent of their interest in the land, and invoke in their behalf the familiar principle that when a person enters upon, or takes possession of *the property* of an infant, a court of equity will consider such person entering as guardian or trustee, and will decree an account against him. That such is the law cannot be questioned. 31 Eng. Ch. 505; 8 Fla. 153. But is it true that infant tenants in common of lands are tenants in common of the crops produced thereon by their co-tenant, through a sole use and occupation of the common estate?

In Coke Litt. 200, b, the common law upon the subject of tenants in common is thus announced: "If one tenant in common maketh his companion his bailiff of his part, he shall have his action of account against him. But although one tenant in common, without being made bailiff, take the whole profits, no action of account lies against him."

It was manifestly unjust to permit one tenant in common thus to take the whole profits of the common estate without accounting, and it was the purpose of the statute of 4 Ann, ch. 16, to correct that evil. That statute, which is in force in this State, enacted that an action of account shall lie by one tenant in common against another who has *actually received more than his share of the profits*.

Under the statute of Ann, it was no longer necessary that one tenant in common should take the profits as bailiff by appointment to make him responsible. It was only necessary that he should receive more than his just share of the profits. By this act, and without appointment by his co-tenant, he became bailiff, and was responsible for what he *actually received* beyond his just share.

The English courts, however, held that there was not a *receiving* within the meaning of the statute in cases where one tenant in common had enjoyed more of the benefit of the subject or made more by its

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occupation than the other, and restricted the statute to cases only where one tenant in common receives money, or something else, from *another person*, to which both co-tenants are entitled by reason of their being tenants in common, and in proportion to their interest as such, and of which the one receives and keeps more than his just share according to that proportion. Mere occupancy by one tenant in common, under this decision, involved no liability to account to another tenant in common. These are the views announced by Baron PARKE in 9 Eng. Law and Eq. 339.

The same view has obtained in the United States, in the State of Massachusetts, 12 Mass. 156; California, 12 Cal. 422; New York, 18 Barb. 265; Kentucky, 7 J. J. Marsh. 139; Maryland, 30 Md. 126; New Jersey, 3 Stockt. 404; and Missouri, 29 Mo. 366. A different doctrine has prevailed in the States of Virginia, 16 Gratt. 21, 52; Vermont, 44 Vt. 347; South Carolina, 1 McMull. 69; and Georgia, 14 Ga. 436.

In these States the occupying tenant has been held responsible for what he has realized beyond his just proportion, and has been sometimes charged with a yearly rental valuation.

Where there has been an ouster of one tenant in common by another, or a use of the whole property, accompanied by an exclusion, then an account is decreed. 30 Md. 126; 44 Vt. 348; 27 Ind. 52; 22 N. J. 85; 28 Iowa, 527.

After a careful examination of all the authorities upon this subject cited by the appellant, as well as many more which we have consulted, we can find no sanction for the view that the plaintiffs had any *property* in the products raised by defendant, Bird. Even where there is a liability, it is a liability to account for rents and profits received as distinct from a liability in an action for conversion of the property, or other like actions based upon a right of property in the plaintiff. Each tenant in common has an equal right of entry and possession. The possession of one is, in contemplation of law, the possession of the other, and to rebut such presumption, an actual ouster must be shown.

The title and property in the crops raised upon the land occupied by the one tenant in common vest in him. He can mortgage and sell the entire crop, and if it is gathered before partition, the crop is his property. These crops have been the result of his separate occupation, the use of his labor, skill and industry. The crop of 1873 was made during an occupancy by consent of the plaintiffs, and under the sanction of the court. Bird, having received advances from Earle & Perkins under these circumstances, their mortgage upon the crops gathered, and the proceeds of which are now under the control of the court, is good as

against the claim of property urged by plaintiffs. As to the crop of 1873, Bird was in possession by their agreement, and if plaintiffs had disturbed his possession, they would have been trespassers. They have no property in these crops. A growing crop is part of the freehold. Had plaintiffs obtained partition while the crops were growing, they would have been, as against Bird, entitled in severalty to such part as was growing upon the land assigned them. 4 Metc. 415; 4 Kent, 370. Whether this would have been the rule as against the merchant making advances, through which the crops were raised, it is unnecessary here to inquire, as there has been no such partition.

Our conclusion upon this branch of the case is, that neither Bird nor Earle & Perkins, in appropriating the crops raised upon the common estate, entered upon or used the property of an infant; that the title and ownership of these crops was in the occupying tenant, subject to liability to an account, if his possession was adverse and exclusive, or the result of ouster.

The claim that either Bird or Perkins held the legal title to these crops as trustee, or that they were in any manner trustees, cannot be entertained. If Bird had the right of property in the crop as an incident to his right of entry and possession, labor and cultivation, then it is impossible that he can be a trustee for the benefit of others in property in which he has the entire, the sole and exclusive property himself, unless one who has the absolute and unqualified ownership of a chattel can be the trustee of another as to that chattel, a proposition so manifestly erroneous, that it needs only to be mentioned to perceive its error.

In a case of precisely similar character to this in many respects, and where infants were plaintiffs, the Court of Appeals of South Carolina held expressly that defendants occupying the relation that Bird does in this case to the plaintiffs, could not be regarded as trustees of the complainants. 1 Speer's Eq. Cas. 264.

If Bird cannot be so regarded, as a matter of course his mortgagee for value, with knowledge of the state of his title, cannot be treated as a trustee.

The bill as to Earle & Perkins was properly dismissed. Plaintiffs had neither equitable nor legal right as against them. If they had any right against Bird, it did not extend beyond a right to an account; there was neither lien nor property in the crops raised by his labor and occupation.

The next and only remaining question presented by this appeal is, was the interlocutory decree erroneous in so far as it revoked the restraining order of November 27, 1874, and in so far as it directed the commission-

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ers in making the partition to assign to W. C. Bird the portion upon which was located the family homestead?

The order of November 27 restrained Bird from disposing of the crops made by him. He alleges in his answer that he did not, for the year 1874, cultivate more than one-third of the land. He swears positively that he did not exclude his co-tenants. As to the other crops the plaintiffs, we have seen, have no property in them or lien thereon. We can see no ground for the restraining order. It was properly revoked.

The next question is as to the matter of the partition.

The power of the chancellor over the entire subject cannot be denied. He cannot be bound against his own views of right, and in the exercise of his general discretion, by the action of the commissioners. And while it is unquestionably true, as a general rule, that the chancellor should adopt the action of parties appointed by himself to take testimony, inspect the lands, and after consideration of the entire subject, to act; still there is no absolute rule making it his duty so to do. Under the statute he has power to remove the commissioners, and the whole matter is one of judicial discretion with which this court will not interfere, unless in a plain case of wrong and injustice. It is the general doctrine prevailing in appellate courts that they will not, except in plain cases, interfere with such discretions. Except as is otherwise provided in the statute, the chancellor had all the powers of a court of equity over the subject. The court is invested with all the cumulative powers created by the statute, and retains all chancery attributes except as otherwise provided by the act.

It cannot be denied that it was within the power of the court to direct the commissioners to assign to Bird that part of the land upon which was situated the homestead. Mr. Justice STORY says: "The court should assign to the parties respectively such parts of the estate as would best accommodate them and be of most value to them with reference to their respective situations in relation to the property before the partition." Nor will courts of equity, in making these adjustments, "confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common."

We cannot see that the plaintiffs, either the children of Daniel B. Bird or of Pickens B. Bird, stand in any such relation to the homestead in this cause as would induce us to control the discretion of the chancellor, and direct its assignment against his judgment to one or the other of them, except upon one hypothesis. If the fact be that the allotment of

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the homestead placed to W. C. Bird will result in its being subject to a heavy mortgage debt of such character as will render it subject to sale, and it is not made to appear by W. C. Bird that he can retain it as his homestead, then it should be assigned to the children of one or the other of the brothers as the chancellor may, in his discretion, determine it best under all the circumstances. The plaintiffs allege that such a mortgage deed exists; that defendant, Bird, is in no condition to redeem; that the assignment of the homestead place to him is an assignment virtually to his creditors or to purchasers at a sale to be had under the mortgage; that both he and his wife have waived all right of homestead in the premises, and have executed deeds by which they have consented to a sale to pay their debt. If this will be the result, then it is manifestly and plainly unjust to prefer the creditors of W. C. Bird to the children of his brothers. If this will not be the result, then defendant, Bird, has certainly an equal right to the homestead, and such assignment should not be disturbed. The assignment cannot be affected by a liability to account, if there be such liability, or the appropriation of past crops. It should be made with reference to the respective situations of those interested to the property before partition. In this case the homestead was occupied by W. C. Bird; the plaintiffs, infants, had other homes. Why should they be given the homestead, and W. C. Bird denied it? W. C. Bird is the only surviving son, and has been occupying it as a home.

The record now before the court does not enable us to come to any conclusion upon this subject, nor did the testimony and record before the chancellor enable him to pass upon this question. The result is that this case must go to the court below for a determination of the question of partition and for further proceedings. The decree dismissing the bill as to Earle & Perkins is affirmed. The interlocutory decree, so far as it assigns to defendant W. C. Bird the homestead place, is reversed, and the case is remanded for further proceedings not inconsistent with his opinion and conformable to law.

CASES.
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

SAYERS V. WALL.

(26 Gratt. 354.)

Husband and wife — conveyance by husband to wife — when equity will sustain as against subsequent creditors.

A husband conveyed all his real estate directly to his wife in consideration of "love and affection," and the deed was duly recorded. He was at the time but slightly in debt and was possessed of a large amount of personal property. He afterward contracted debts which his personal property — by reason of losses occasioned by war — was insufficient to pay, and his creditors (one of whom had a small claim which was due when the conveyance was made) filed a bill in equity to subject the land conveyed to the wife to the payment of the debts. *Held*, the deed was good in equity, and that the land would not be subjected to the debts.

BILL in equity by Wall and another, late merchants and partners, alleging that in 1867 they recovered a judgment against Reuben Sayers for \$1,266; that said Sayers had no personal property, but that he was seized in fee simple of seven hundred and fifty acres of land in Pulaski county, and praying that so much of said land as is necessary be sold to pay their judgment.

Defendant, Sayers, made answer, alleging that he was not then and had not been for sixteen years the owner of the land mentioned, but that said land was the property of one Comer and others, named as heirs at law of Eleanor A. Sayers, deceased.

Thereupon the said Comer and others named were permitted to file an answer in the case, wherein they aver that the land in question was in

November, 1855, conveyed by Reuben Sayers to his wife Eleanor A. Sayers, and the deed was immediately put upon record. That at that time Reuben Sayers owed very little, and retained property ample to pay his debts. That not more than \$50 of the plaintiff's debt was then due. That Mrs. Sayers died in 1864, leaving J. Howe Sayers, Mrs. Comer, Mrs. Dunn and Mrs. Deaderick, her children and heirs at law. That soon after the war the said heirs agreed to sell the land if \$80,000 could be gotten for it; and A. C. Dunn was authorized to make the sale if he could do it at that price. That as the parties were scattered, it was agreed among them that they would make a deed conveying the land to Reuben Sayers, to be held by a third person as an escrow, to be delivered to Reuben Sayers when the sale was made, that he might convey the land to the purchaser, and thus prevent delay, and remove any cloud upon the title from the fact that Reuben Sayers had conveyed the land directly to his wife. That accordingly a deed was prepared and was executed by J. Howe Sayers, Comer and wife, and Dunn and wife; and it was expected that Lizzie, the youngest child who was not quite of age, would execute a like deed on her coming of age. That the deed, when executed, was intended to be deposited with Isaac Hudson, their attorney, but remained with the justice who took the acknowledgment of the parties; and Lizzie, on coming of age, declining to execute a deed, and Dunn having failed to sell the land, defendants regarded the deed as of no effect, and supposed it had been destroyed, as instructions to that effect had been given to said attorney. That said deed never was delivered to Reuben Sayers, but remained with the justice who took the acknowledgment of the parties, until about the commencement of this suit, when the plaintiff, Wall, with a full knowledge of these facts, obtained said deed from the said justice by paying him his price therefor, and then procured the recordation of the same by affixing the necessary United States revenue stamps, and paying the clerk his recording fee and the State tax.

The deed from Reuben Sayers to his wife is as follows: This deed made this the 15th day of November, in the year one thousand eight hundred and fifty-five, between Reuben Sayers and Eleanor Ann Sayers, his wife: Witnesseth, that whereas the said Reuben Sayers intending shortly to visit the Western country, and knowing the uncertainty of life, and to provide a permanent home and a future residence for his family, in case he should not be permitted to return in safety home, and seeking to provide against confusion at all events, now this indenture witnesseth, that for and in consideration of the premises, and for the natural love and affection he has for his wife, the said Reuben Sayers

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doth grant unto the said Eleanor Ann Sayers his entire real estate lying in the county of Pulaski, his present residence, containing seven hundred acres, more or less. Witness the following signature and seal.

REUBEN SAYERS. [Seal.]

This deed was acknowledged by Reuben Sayers in the clerk's office, on the 21st day of November, 1855, and admitted to record.

The evidence shows very clearly, that at the date of the deed from Reuben Sayers to his wife, all the debts he owed did not amount to \$100, and that he then owned personal property, including eight valuable negroes, worth from \$10,000 to \$12,000. He continued to live on the land, with his wife and children, doing apparently a prosperous business; and at the end of the war he owned thirteen slaves, which were then lost to him.

The court below decreed that the said lands be sold to pay the debts, and the heirs of Mrs. Sayers appealed.

Wade and J. A. Campbell, for appellants.

Gilmore & Walker, for appellees. 1. The deed in this cause is a conditional one, and the condition is a condition *precedent*. The grantor "returning in safety home," no estate ever vested in the grantee. 2 Bl. Com. 154; Co. Litt. 217; 4 Kent's Com. 125; 2 Rob. Prac. 59; 5 id. 779, and note.

2. If the deed be not a conditional one, yet, being a deed directly from husband to wife, it is void at *law*, and will only be enforced in a court of equity where it is made on *valuable* consideration or as a *suitable* provision for a *wife* or *child*; and where it is made as a suitable provision for a wife or child, the court of equity will not enforce the deed if the rights of *creditors* are interfered with. *Shepard v. Shepard*, 7 Johns. Ch. 57; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 id. 423; *Sexton v. Wheaton*, 8 Wheat. 229; *Jones and wife v. Obenchain*, 10 Gratt. 259; *Ellison v. Ellison*, 1 Lead. Cas. in Eq. 199; Spence's Eq. Juris. 852; *Wright v. Wright*, 1 Ves. Sr. 409.

3. The deed in this case is not a *suitable* provision for the wife. It gives to her all his real estate, worth, according to the testimony, \$30,000. All the property retained by the grantor, according to his *own* testimony, did not exceed \$10,000 or \$12,000.

4. A court of equity will not enforce a deed from husband to wife if there is any unfairness in it. *Sims v. Rickets*, 35 Ind. 181; *Thompson v. Mills*, 39 id. 528.

5. The deed in this case hindered, delayed and defrauded creditors to

the extent of the debts contracted prior to the date of the deed; and for that reason ought not to be upheld in a court of equity. The question in such a case is not whether the debtor retained property enough in his hands to pay his *then* debts, but the question is were those debts paid, and, if the debts were not paid, it is the same as if he had conveyed away all his property. *Spirett v. Willows*, 3 De Gex, Jones & Smith, 302; approved in *Freeman v. Pope*, Eng. Law. Rep., 9 Eq. Cas. 206.

ANDERSON, J. This controversy is in relation to the deed executed by Reuben Sayers to his wife, Eleanor Ann Sayers, on the 15th day of November, 1855; whether the real estate conveyed by it vested in Mrs. Sayers, and descended to her children and heirs at her death; and whether they can hold it against subsequent creditors of Reuben Sayers.

Before proceeding with this inquiry, it will be well to dispose of a question raised by the record, whether the appellants, or any of them, have, by their deed, reinvested Reuben Sayers with any interest or estate, which he may have passed to his wife by said deed? No such reconveyance or release to Reuben Sayers is alleged by the plaintiffs in their pleadings. But a paper, purporting to be a deed of conveyance or release from three of the four heirs of Mrs. Sayers to Reuben Sayers, having been brought to the notice of the court by the master, and a certified copy of it from the records of the register's office exhibited with his report, it was very properly noticed by the appellants in their petitions to be made parties defendants and in their answers. They aver in their petitions, and in their answers, that the said paper was never delivered as their deed. That it was never intended to be delivered as a deed, except only upon a certain contingency which never arose, and that it never was delivered. That one of the plaintiffs got possession of it from the magistrate before whom it had been acknowledged, without the knowledge or consent of either of them, or of Reuben Sayers, to whom it had not been delivered, by paying the magistrate's fees, who delivered it to him without authority. And that the plaintiff, after thus getting unlawful possession of it, without authority, and without their or Reuben Sayers' knowledge or consent, lodged it with the clerk to be recorded, and paid the tax on it and the clerk's fees for recording. These allegations are fully sustained by evidence.

I am clearly of opinion that said paper cannot operate as a conveyance or release of any thing to Reuben Sayers; and that if there was any estate vested in the appellants by the death of Mrs. Eleanor H. Sayers, under the conveyance of November 15th, 1855, it is not divested or impaired by that paper.

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I proceed now to inquire, whether any rights vested in Mrs. Sayers, under the said conveyance of her husband, which have descended to her children, and which are not liable to the judgments of subsequent creditors of the grantor against him? This is the important, the main question in the cause.

“There is nothing inequitable or unjust (Mr. Justice STORY remarks) in a man’s making a voluntary conveyance or gift, either to a wife or to a child, or even to a stranger, if it is not *at the time* prejudicial to the rights of any other persons, or in furtherance of any meditated design of future fraud or injury to other persons.” Story’s Eq. Jur., § 356.

In *Sexton v. Wheaton*, 8 Wheat. 229, MARSHALL, Chief Justice, in delivering the opinion of the court, assumes that the conveyance in that case “must be considered as a voluntary settlement made on his wife by a man who was indebted at the time.” And he inquires, “Can it be sustained against the subsequent creditors?” In his answer to that question he says: “It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others; and such disposition, if it be fair and real, will be valid.” In these few words, that great judge enunciates a principle, upon which all cases of this class may be determined, and upon which their decision may rest. It is the absolute right of a man to dispose of his own property as he pleases, so that he does no injury to the existing rights of others. The question is, in every case, did the voluntary conveyance interfere with the existing rights of others? If it did not, and was real and *bona fide*, the grantor having an absolute right to part with his own property, and to bestow it on whom he pleases, his conveyance is valid. There are none who can gainsay it. By his deed of conveyance his grantee is absolutely invested with the title; and the subsequent dealings of the grantor with others, or the liabilities which he may subsequently come under to others, cannot impair or affect the rights which had vested in his grantee. The property which vested in his grantee by a fair and *bona fide* conveyance is no longer his, and cannot be made liable for his debts subsequently contracted. “The limitations to this power (the chief justice further says) are those only which are prescribed by law.” He then proceeds to consider the statute against fraudulent conveyances. “In construing this statute (he says) the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors. With regard to subsequent creditors the application of this statute appears to have admitted of some doubt.” After a lucid and extensive review of the cases, he thus concludes: “From

these cases it appears that the construction of this statute is completely settled in England. We believe that the same construction has been maintained in the United States. A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors on the ground of its being voluntary." I think, in this conclusion, he is sustained by the current of decisions in England and America.

But it may be impeached on the ground that it is fraudulent. The plaintiffs do not charge fraud in their original or amended bill. They take no notice of this deed of conveyance in any way. They altogether ignore it, although they had actual knowledge of its existence before they brought this suit. They did not bring the suit until after they got possession of the paper purporting to be the deed of three of the children and heirs of Eleanor A. Sayers to Reuben Sayers. Mr. Cecil, the justice, testifies that they got possession of it in the spring of 1871, and he thinks before the 1st of June, 1871, the date of the institution of this suit; and the certificate of its recordation is dated 27th April, 1871. They must have had possession of it prior to that date. This paper refers expressly to the deed from Reuben Sayers, to his wife Eleanor A. Sayers, of the 15th of November, 1855, and purports to release all their claims as heirs at law of said Eleanor. The plaintiffs certainly had actual knowledge of the existence of the said deed at that time, if they had not before. The presumption is, they had knowledge of it before. There was no concealment of it. It was written by the clerk, the printed copy states, on the 15th of November. On the 21st of November it was acknowledged before him in his office after it had been delivered to Mrs. Sayers, and was admitted to record. No doubt it was a subject of remark, and was known generally by his neighbors. But the registration was constructive notice to the world, and the presumption is, that these plaintiffs were apprised of it when they afterward credited him. The only allegation of fraud is made by Hudson, administrator of Hamilton Sayers, in his petition for a rehearing. Yet the final decree for the sale of the lands is founded only upon the ground that the conveyance is fraudulent and void as to creditors. If fraud had been alleged in the pleadings (and it might have been by an amended bill or by answer to the appellant's petitions to be admitted defendants, if the plaintiffs believed there was any ground for the allegation), what proof is there to support such a charge, or the assumption of the decree? Mr. Justice STORY adds to what I have heretofore quoted from him, and in the same section: "If, indeed, there is any design of fraud or collusion, or intent to deceive third persons in such conveyances, although the party be not then indebted, the conveyance will be held entirely void as to subsequent as well as to present

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creditors ; *for it is not bona fide.*" Cord's Legal and Equitable Rights of Married Women, §§ 54, 75, citing *Lord Townsend v. Windham*, 2 Ves. Sr. 1 ; 12 id. 155. Let the rule, as thus clearly laid down, be applied to the case in hand.

At the date of said deed, Reuben Sayers, the grantor, was the owner of a large personal property, in addition to the real estate he conveyed to his wife, consisting of slaves, horses, cattle, sheep, hogs, wagons, farming implements, house furniture, etc., of the value of from \$10,000 to \$12,000. His indebtedness did not exceed \$100. After the execution of said deed, he continued to live upon the farm, and had the management of it, supporting his wife, and educating and maintaining their children. He purchased and paid for another tract of land, which he sold again. He dealt liberally in cattle, buying and selling, which seems to have been a source of considerable income : he seems to have been a man of thrift and good credit, and his personal estate was augmented rather than diminished, until the end of the war. The trifling debt he owed prior to the execution of the deed in question seems to have been satisfied, and the debts which he now owes, and which are proved in this cause, were contracted by him subsequent to said conveyance. The precise date at which they were severally contracted does not appear, but none of them earlier than 1857 or the latter part of 1856, except two small notes amounting to about \$51, which he owed prior to the conveyance, and which were transferred to the plaintiffs, it does not appear when. These notes were incorporated with the debt, subsequently contracted with Wall & Jordan, and embraced in the new obligation, which they took for the whole — upon which he afterward paid, as appears from the judgment, \$75. Whether he had made any payment to those parties upon his indebtedness to them, before the execution of the bond or note upon which the judgment was rendered, does not appear. I think, whether the evidence shows the novation of that small pre-existing debt, or not, it may be assumed, so far as it concerns the question now involved, that it has been satisfied. And I think it may be fairly inferred from the evidence in the record, that there was not a point of time, from the 15th of November, 1855, until the close of the war, that a moiety of the personal estate owned by Reuben Sayers would not have been ample, and more than sufficient, to have paid every debt he owed in the world. The conduct of his creditors shows that they regarded it ample to secure them. It was upon the faith of that they credited him, and forebore to collect their debts — for they must be presumed to have known that the real estate did not belong to him, but was the property of his wife. (It does not appear that they thought of suing until after they got possession

of the supposed deed of release.) And we have seen that his personal estate was ample to give him the credit he had.

What *fraudulent* motive could he have had to make said conveyance to his wife? He still retained ample property in his own hands to satisfy all the debts which he *actually* subsequently contracted. It could not, therefore, have been in anticipation of contracting those debts and avoiding the payment of them that he conveyed his real estate to his wife; for he had ample property left to satisfy them. The same fact is a complete answer to the argument of appellee's counsel, that he made the conveyance in contemplation of incurring a debt of \$3,000 for the building of a residence on the farm. Why would he have made a conveyance for such a purpose, when he knew that he retained property out of which the cost of the building he contemplated erecting could be made, if it were even threefold or fourfold the actual cost. I am satisfied from the proofs in the cause, that Reuben Sayers, in contracting the subsequent debts, was conscious of his ability to pay them, and had no thought or purpose of not paying them; and that his creditors credited him, and forebore with him, upon the faith of his personal property which was ample to pay his debts; and that he and they were disappointed by the result of the war, which wrested from him, by the power of the sword, the property which he relied on in the main as affording him the means of paying his debts, and upon the faith of which his creditors credited him. It does not appear that he was sued by any creditor before the close of the war. If all of them had sued and obtained judgments before its termination, he had ample property to have satisfied every dollar he owed; and if their debts are lost, it is the misfortune of both, rather than the wrong of either.

But it was argued by appellee's counsel, that the conveyance of the whole of his real estate to his wife — so large a proportion of all he was worth — is a badge of fraud. The same argument was urged in *Sexton v. Wheaton*. It was contended that the house and lot contained in the deed to his wife was the bulk of Wheaton's estate. The Chief Justice said: "If the fact were proved, it does not follow that the conveyance must be fraudulent. If a man, entirely unincumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In *Stephens v. Olive*, 2 Bro. Ch. 90, the whole real estate appears to have been settled, subject to a mortgage of a debt of £500; but that settlement was sustained. * * A man who makes such a conveyance necessarily impairs his credit (unless he has large personal property, as in this case); and if openly done, warns those with whom he deals not to trust him too far; but this is not fraud."

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Nor is the possession by the husband after the conveyance a badge of fraud. Schouler's D. R. 288, note; 2 Perry on Trusts, 277, § 678. I can see no evidence of fraud in this case. On the contrary, I think the circumstances disclosed by the evidence in the record show that Reuben Sayers, in executing the conveyance to his wife, of the 15th of November, 1855, acted fairly and in good faith, and that there is no ground even for the suspicion of fraud.

The question now arises as to the validity of the deed to vest the real estate in Eleanor A. Sayers. It is a conveyance directly from a husband to his wife. It seems to be well settled that at law it has no validity, because of the legal unity between husband and wife, the latter having no legal existence separate from her husband. As a consequence of this old common-law doctrine, it is held by the courts of law, that a deed directly from a husband to his wife must be inoperative and void; whilst if it had been made to a third person, for the benefit and separate use of the wife, the same courts held that it is valid, and vests the beneficial estate in the wife. Equity, which looks more to the substance than the form, holds that the conveyance directly from the husband to the wife, if fair and free from the taint of fraud, is just as valid as if the conveyance had been made to a trustee for the benefit of the wife. Equity will interpose a trustee to hold the estate for the benefit of the wife, or will treat the husband as a trustee for the wife, and will give the same effect to the conveyance as if it had been made to a third person for the sole and separate use of the wife. *Huber v. Huber's Adm'rs*, 10 Ohio, 371; *Wallingsford v. Allen*, 10 Pet. 588; 24 Vt. 375; *Deming v. Williams*, 26 Conn. 226; *Putnam v. Bicknell*, 18 Wis. 333; *Sims v. Rickets*, 9 Am. Rep. 681; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Jones & wife v. Obenchain et als.*, 10 Gratt. 259. These cases fully sustain the doctrine as I have laid it down. In *Deming v. Williams*, 26 Conn., *supra*, the judge, in a very lucid opinion, says the cases found in the books from *Slanning v. Style*, decided in 1734, 8 P. Wms. 834, to the present time, sustain the principle, "that so far as the form and substance of the gift or alienation are important, that which would be good if made to a third person is good in a court of equity if made by the husband to his wife." That is sensible.

In the same case it was held, that in order to give the wife a separate use, words indicating such intention are necessary in a conveyance from a stranger to the wife; but that it seemed to be "well settled that they are *not necessary* in a conveyance direct from the husband to the wife. The law attaches to absolute deeds, and transfers (says the court) a full alienation of the entire interest or property, so far as the alienation is

permitted by the principles of law and equity. *Whitten v. Whitten*, 3 Cush. 191, supports the same doctrine. It is treated as the settled doctrine; and, according to this authority, the deed from Reuben Sayers to his wife, if absolute, vested in his wife a separate estate, though such words are not used; and consequently he is not entitled to courtesy.

As a corollary of the foregoing, whilst as held by the courts of law, the deed of the 15th of November, 1855, passed nothing from Reuben Sayers to his wife, and divested from him nothing of his title; by the rules and principles of equity, if the deed, according to its intent and effect, is absolute, it immediately divested the grantor of all title in his own right, legal or equitable, in the property conveyed, and vested an absolute separate estate in it in his wife. The legal, as well as the equitable estate, was vested in her by the terms of the deed, which could not take effect by reason of the legal fiction, that the wife and the husband are one, and she can have no legal existence separate from him; but equity regards the title of the husband in his own right as having passed from him to the wife, vesting in her a separate estate, in which the husband has no interest in his own right, legal or equitable. And courts of equity will exert their powers when necessary, and in a proper case, to give full effect to such conveyances. In order to give the deed of conveyance in question such effect, nothing further is necessary to be done by the grantor. He signed, sealed and delivered the deed, and acknowledged it to be his act and deed in the mode prescribed by law; and the same has been registered according to the requirements of the statute. Nothing further is necessary to be done by the husband, or can be done by him, in order to complete and perfect the conveyance. As done, upon the principles and doctrines of equity, the title of the husband is divested, and is vested in the wife, and that, I take it, without any action by a court of equity. Thus, though there had been no action by the court of equity, an absolute separate estate was vested in Eleanor A. Sayers, upon the principles and doctrines of equity, immediately upon the execution of said conveyance. She remained invested with such separate estate until her death, when it descended to her children, just as if it had been an estate recognized at law. And now when it is sought to divest that estate from them, and subject it to the payment of the subsequent debts of the grantor, though courts of law will not recognize the conveyance made to her, under whom they claim, it being a valid conveyance upon the principles of equity, it is competent for them to invoke the aid of equity, to give effect to the deed, and to protect them in their rights; and it is proper for them to invoke that protection in this suit, which seeks, by a court of equity, to subject their property to the payment of the grantor's debts.

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It was contended for the appellees, that the appellants were not properly before the court, and ought not to be allowed to assert their claims in this suit; or at least they could only do so by a cross-bill. James Deaderick and wife were made defendants by the amended bill, and the other appellants were made defendants upon their petitions, and had leave to file their answers, without objection by the appellees. I am not sure that they were not necessary parties. They were in the actual enjoyment of the subject-matter of the suit, and had an interest in it which was likely to be defeated or diminished by the plaintiffs' claim; and had an immediate interest in resisting the plaintiffs' demand; and all persons who have such immediate interests are necessary parties to the suit. 1 Daniel's Ch. Plead. & Prac., ch. 5, § 2, p. 246. It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, that further litigation may be prevented. And courts of equity delight to do justice, and not by halves. Story's Eq. Pl., § 72. If it is true, as contended by the learned counsel, the plaintiffs might have proceeded to enforce their judgment liens, ignoring the appellants' claim of title, subjected the property to sale, and proceeded by ejectment at law to dispossess the appellants, in which they must have succeeded, as the appellants could not have asserted their title in a court of law, and that the decree in this suit for the sale would not be binding on them if they were not parties, the appellants would thereby have been driven to the necessity of bringing a suit in equity to enjoin the plaintiffs, and to assert their rights which might have been litigated and determined in this suit. Why thus multiply suits? The plaintiffs were proceeding in a court of equity to enforce their judgment liens against lands which they knew the appellants claim to be their property, and denied to be chargeable with their judgments; that their defense could only be made in a court of equity, and that complete justice could be done in this suit, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit. It seems to me they ought to have been made parties. How could there have been a fair sale of the lands to satisfy their judgments until the rights of the appellants were determined? They would have of course asserted their claim, and forbid the sale, and who would have felt safe in purchasing until the validity of their claim was determined? It was necessary to make them parties in order to remove a cloud which rested on the title, before a decree for the sale. I am inclined to think they were necessary parties in this suit. But it is not necessary to decide that question now, as they have been made parties, and in many cases a person may be made a

party though he is not an indispensable party. Story's Eq. Pl., § 153. In this case they were made parties on their motion, and I think properly so. And although it perhaps would have been more proper to have asserted their claim by cross-bill, I think their claim was a defense to the proceeding by the plaintiffs, and might be made by answer, in which the affirmative matter of defense was set out. But their petition might be treated as a cross-bill. It seems that they were properly before the court, and that the case was before the court, by admitting them parties defendant, in such form as to enable it to decide and settle the rights of all parties interested in the subject, and to do complete justice, and prevent a multiplicity of suits.

But it is contended for the appellees, that a court of equity will not give effect to a conveyance from husband to wife against creditors, though subsequent to the conveyance, upon any consideration which is not valuable. I can perceive no good reason why subsequent creditors should have any superior equity to that of the heir of the grantor, where he had given the property to a second wife, who was not the mother of the heir claiming it. If his deed of gift divested him of the lands and vested them in another, and the transaction was open and fair and untainted with fraud, the property ceased to be his from the date of the conveyance, and became the property of his wife, to her separate use; and I cannot perceive what equity his subsequent creditors would have, who credited him upon the faith of his own property, to charge his wife's property with the payment of his debts. "It is true," Mr. Justice STORY says, "that in regard to the defective execution of powers, etc., courts of equity do not always interfere and grant relief, but grant it only in favor of persons in a moral sense entitled to the same, and viewed with peculiar favor, and where there are no opposing equities on the other side." (1 Story's Eq. Jur., § 95, cited by appellee's counsel in brief.) Here the author says, the relief will be granted in favor of a person who is, in a moral sense, entitled to the same; and none are more so than a wife or children. But the author adds, "where there are no opposing equities on the other side." I have said that I cannot perceive the ground of an equity in the subsequent creditor to charge the wife's separate estate with the debt of her husband, for which he obtained credit upon the faith of his own property. I think the circumstances of this case which I have already detailed, are peculiarly strong against any such claim on the part of these creditors of the husband. Having by their forbearance lost their debts, in consequence of their debtor's losing his property by the result of the war, upon the faith of which their debts were contracted, it seems to me they would have no equity to charge the

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property of the wife, which was openly and fairly settled upon her as her separate estate long before those debts were contracted. So that in this case there are no *opposing* equities ; and the authority cited seems to be strongly in support of the interference of a court of equity to give the aid sought.

But will a court of equity give effect to the conveyance which is founded not upon valuable, but only meritorious consideration, in favor of a wife or children ? Upon this point I will refer to Story's Eq. Jur., § 169, where he expressly states that assistance will be given to a person standing upon a valuable or meritorious consideration. The authorities on this point are somewhat conflicting, and as this opinion is already too much extended, I will not undertake to review them, but will content myself with a reference to the opinion of ALLEN, J., in *Jones and wife v. Obenchain et al.*, 10 Gratt. 261, in which he reviews the decisions on the subject. It was held by Judge ALLEN — and all the judges concurred in his opinion — that where there was a meritorious consideration, meaning thereby a provision for a wife or child, equity would enforce a defective conveyance. In support of that opinion he cites *Shepard v. Shepard*, 7 Johns. Ch. 57, and *Kekewich v. Manning*, 12 Eng. L. & E. 120. He refers to the opinions of Lord THURLOW and Lord ELDON as favoring the doctrine, and the remarks of BROOKE, J., in *Darlington v. McCool*, 1 Leigh, 86. He cites two decisions by the Court of Appeals of Kentucky, and the remarks of Chief Justice GIBSON in *Dennison v. Gochring*, 4 Barr (Penn.), 175. He also cites and relies on the opinion of Lord Chancellor SUGDEN in *Ellis v. Nimmo* ; and reviews the decisions, which it is said overrules that decision of the Lord Chancellor, which he was of opinion were decided on other grounds. But suppose he had regarded those subsequent cases as overruling *Nimmo* and *Ellis*, would it have changed his opinion and the decisions of this court in *Jones v. Obenchain* ? I can hardly think it would. The opinion of Lord Chancellor SUGDEN was not, nor were the decisions of the courts of Great Britain, authority with this court ; but the Lord Chancellor's opinion was regarded with the consideration that its intrinsic merit and the respect due to his great learning entitled it to receive. And the cases which are said to have overruled him were before this court and reviewed by Judge ALLEN, and did not change the decision. I must regard that case therefore as a decision of this question by the Court of Appeals of Virginia in which all the judges concurred, and am not disposed to disturb it, whether *Nimmo* and *Ellis* has been overruled or not. And I find it is sustained by other American decisions, which are entitled to very great respect. I will only refer to a recent decision of the Court of Appeals of Indiana, in *Sims v. Rickets*, *supra*, which I think is in point.

It remains now only to inquire whether the deed in question is a real *bona fide* conveyance, and whether it is absolute or only conditional. We have seen that it was fair and unassailable even upon the suspicion of fraud as to the creditors of the grantor or other persons: was it a real and *bona fide* conveyance as between the husband and wife? The terms of the deed, and the deliberation and solemnity of the act, the lapse of time for reflection from the writing of the deed until its acknowledgment and recordation, the continued acquiescence of the husband during the life-time of his wife, for a period of nearly ten years after the execution of the deed, without even an attempt to obtain a release from her (which may be regarded as a confirmation of the conveyance to her), leave no room for doubt that the transaction was real and *bona fide* between them, and was intended to divest the grantor of his title, and to vest it in his wife, according to the terms of the deed. Is the conveyance absolute, or only conditional?

This inquiry can only be answered by recurring to the instrument itself. It recites, "that whereas the said Reuben Sayers, intending shortly to visit the western country, and knowing the uncertainty of life, and to provide a permanent home and a future residence for his family, in case he should not be permitted to return in safety home, and seeking to provide against confusion at all events, now this indenture witnesseth, that for and in consideration of the premises, and for the natural love and affection he has for his wife, the said Reuben Sayers doth grant unto the said Eleanor Ann Sayers, his entire real estate lying in the county of Pulaski, his present residence, containing seven hundred acres, more or less. Witness the following signature and seal." Signed, "Reuben Sayers. Seal."

There are two considerations set in this deed, which moved the grantor to its execution; first, the providing a permanent home and future residence for his family; second, the love and affection he had for his wife.

Let it be conceded that one consideration of the conveyance was to provide a home for his family in case he did not safely return from the western country, which he expected shortly to visit. If he did return safely, then the conveyance was unnecessary to provide a home for his family on that contingency. But when he executed the deed he did not know that it would so happen, and in consideration of the uncertainty of his safe return he makes an absolute conveyance to his wife. It is not a conveyance to take effect only upon condition that he does not safely return. But the contingency that he may not return is the consideration which moves him to make the conveyance. Is that a conditional convey-

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ance? I think not. The title has passed from him by his own act, upon a consideration which is in part contingent. And the contingency not happening the deed is not void; for it was not made to depend upon the happening of that contingency. It was just because of the uncertainty, the possibility that it might happen, he made an absolute conveyance to his wife.

But the consideration of the conveyance was not merely to provide a home for his family *in case he had not a safe return*. If he had stopped then it might have been so understood. But seeking to remove all confusion (uncertainty) on that point, he adds, "and" "at all events." That is, as I understand it to comprehend whether he visited the western country and was not permitted safely to return or not — whether he lived or died, "at all events" he would make the conveyance. And his indenture witnessed that for and in consideration of the premises, and for the love and affection he had for his wife, he granted to her the land in controversy. This latter was a sufficient consideration to support the deed, even if the contingent consideration had failed. *Skipwith v. Cabell*, 20 Gratt. How could he claim a defeasance? I think it is an absolute conveyance, and not conditional. Upon the whole, I am of opinion to reverse the decree of the court below, and to enter here such decree as ought to have been entered by the Circuit Court, reversing the decree of the County Court, and dismissing the plaintiffs' bill with costs.

The other judges concurred in the opinion of ANDERSON, J.

HOBACK v. KILGORE.

(26 Gratt. 442.)

Vendor and purchaser — deficiency in land sold — measure of damages.

Defendant sold to plaintiff a tract of land with valuable buildings thereon, representing and believing that it contained 127 acres. It contained in fact only 81 acres. *Held*, that plaintiff was entitled to compensation for the deficiency, according to the average value of the land without the buildings, taking the price paid for the land with the buildings as the true value of both together.

A vendor of real estate in his own right is bound to convey the same with general warranty unless it be otherwise agreed between the parties.*

* Compare *Kyle v. Kavanagh* (103 Mass. 355), 4 Am. Rep. 580.

SUIT in equity by Hoback against Kilgore to enforce a contract for the sale of a tract of land by Kilgore to Hoback. The plaintiff alleged that Kilgore sold him the land on the assurance that it contained 127 acres, and relying on that assurance plaintiff purchased and paid \$1,400 therefor. That the tract contained in fact only 81 acres. He therefore claimed compensation for the deficiency. Defendant answered that he sold the land by boundaries and without assurance as to quantity. It appeared from the evidence that Kilgore had purchased the tract as containing 127 acres and that he believed that there was that quantity of land. Kilgore had put valuable buildings on the land.

The court below held that the sale was a sale in gross and that Kilgore was not liable to account.

Burns, for appellant.

Gilmore, for appellees.

MONCURE, P. The court is of opinion that there was a mutual mistake between the vendor and vendee in this case as to the quantity of land included in the boundaries of the tract sold by Isaac Kilgore to Levi Hoback, as in the proceedings mentioned; the vendor having represented to the vendee that the said quantity was 127½ acres, and the vendee having made the purchase on the faith of that representation; whereas, in truth and in fact, there were but 81 acres of land in the said tract.

The court is further of opinion, that the vendee, having fully paid the purchase-money of the said tract according to the contract of the parties, is entitled to be compensated for the said deficiency in the quantity of land in the said tract, according to the principles laid down in *Blessing's Adm'rs v. Beatty*, 1 Rob. 287, and the cases therein cited.

The court is further of opinion, that although, in the case of a mere deficiency in quantity within the boundaries of a tract of land conveyed or contracted to be conveyed, the general rule of compensation is according to the average value of the whole tract (*id.* 805); yet there will be a departure from that rule when particular circumstances require it. *Id.* And the court is of opinion, that there are such circumstances in this case, arising from the fact that there are valuable improvements upon the land, consisting of a dwelling-house, barn, and other outhouses, a tanyard, and a grist-mill, the value of which improvements bears a very large proportion to the value of the land. And the court is therefore of opinion, that in this case the just and true measure of compensation is according to the average value of the land without the improvements,

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considering both together to be worth the contract price of fourteen hundred dollars, estimating the quantity of the land, as the parties did, at $127\frac{1}{2}$ acres.

The court is further of opinion, that a vendor of real estate in his own right is bound to convey the same with general warranty, unless it be otherwise agreed between the parties; and there having been no such other agreement between these parties, the vendor, Isaac Kilgore, is bound to convey the said tract of land to the vendee, Levi Hoback, with general warranty. But though it is necessary for the appellee, Hiram H. Kilgore, who seems to have the legal title to or some interest in the land, to join in the said conveyance; yet as he was not the vendor, he is bound to convey only with special warranty.

And the court is therefore of opinion, that the Circuit Court, instead of making the final decree which it did, ought to have decreed that the said vendee, Hoback, is entitled to a specific execution of the said contract for the purchase of the said tract of land, and to be compensated for the deficiency in the quantity of the said tract which was sold to him as containing $127\frac{1}{2}$ acres, the said compensation to be ascertained in the manner aforesaid. And the court ought to have ascertained the extent of the deficiency and the amount of compensation to which the said vendee is entitled therefor, by a reference to a commissioner of the court, unless such reference had been rendered unnecessary by an agreement of the parties as to such extent and amount; and ought to have decreed the payment of the said amount with interest from the time at which it was due by the vendor to the vendee, and the conveyance of the said tract of land in fee simple to the vendee by the vendor Isaac Kilgore with general warranty, and by the said Hiram H. Kilgore with special warranty, and the payment by the said Isaac Kilgore of the costs of the plaintiff in this suit in the said Circuit Court.

The court is therefore of opinion, that the decree appealed from is erroneous; and it is decreed and ordered that the same be reversed and annulled, that the appellee Isaac Kilgore pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here, and that this cause be remanded to the said Circuit Court for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion.

Which is ordered to be certified to the said Circuit Court of Wise county.

Decree reversed.

TRIPLETT V. ALLEN.

(26 Gratt. 721.)

Vender and purchaser — effect of words "more or less" in deed — deficiency.

Defendant agreed to sell to plaintiff a tract of land "containing one hundred and sixty-six acres." The deed made pursuant thereto purported to convey that amount "more or less;" but there were, in fact, only one hundred and fifty-six acres. *Held*, that the purchaser was entitled to compensation for the deficiency.

BILL by Triplett to enjoin a judgment recovered against him by Allen upon a bond given for part of the purchase-money of two tracts of land sold by Allen to Triplett. The ground rested on was that the land was sold by the acre, and that there was a deficiency in the quantity sold.

The defendant denied that the sale was by the acre, but alleged that it was in gross. The bill was dismissed and Triplett appealed. The other facts are stated by the court.

M. Bird and H. C. Allen, for appellant.

M. Walton, for appellees.

CHRISTIAN, J. The court is of opinion that the decree of the Circuit Court of Shenandoah was erroneous in dissolving the injunction awarded in vacation, and dismissing the plaintiff's bill. The evidence conclusively shows that the sale by Allen to Triplett was a sale per acre, and not a sale in gross. The contract of sale filed with the answer provides "that the said Lemuel Allen doth covenant and agree to sell to the said L. Triplett the home tract of land (with appurtenances thereto belonging), containing one hundred and sixty-six acres, three roods and twenty-eight poles," with certain boundaries described — "together with one hundred and fifty acres of mountain land," for the consideration of \$10,000. This contract was dated the 3d of November, 1869. It seems on the day before this contract was entered into this land was offered at public auction, and the home tract was offered and bid for by the acre. On that day the bidding went up to some \$35 or \$40 per acre, and the land was taken down. On the next day (November 3d) the land was again offered at public auction, and the bidding went up to \$52 per acre. The bidding was then stopped, and there were certain negotiations between the parties; calculations were made, putting the mountain land at

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\$8 per acre ; and the proposition to give for the home tract enough per acre (estimating the tract at one hundred and sixty-six acres, three roods and twenty-eight square poles) to make the purchase-money for the whole amount to the sum of \$10,000. The result of these negotiations was the contract above referred to, by which Allen agreed to sell to Triplett one hundred and sixty-six acres, three roods and twenty-eight poles of what was known as the home tract. A deed was executed on the 2d of December, by Allen and wife, with general warranty, conveying to Triplett this land as described in the contract of sale, except that after the words describing the quantity, are inserted the words "more or less." It turns out upon a survey of the home tract that there is a deficiency of about ten acres.

The court is of opinion that under the contract of the parties and the evidence taken in the cause, the sale was a sale per acre and not a sale in gross, and that the appellee is bound to make good the deficiency at the average value of the home tract per acre.

But if the contract can be considered a sale in gross and not per acre, the insertion of the words "more or less" in the deed does not affect the case. For it is well settled by repeated decisions of this court, that the employment of such words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise ; unless indeed, there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement, and *prima facie* must be intended to influence the price.

Ten acres in a tract of one hundred and sixty-six acres, especially when worth at least \$50 per acre, is not one of these "small deficiencies" to be covered by the phrase "more or less;" and the vendor must be held liable, and the vendee compensated for such deficiency. Nor is the vendor at all relieved from obligation to make good this deficiency by the fact that a part of this land, to the extent of about four acres, was at the time of the sale vested, by proceedings of condemnation in the Manassas Gap Railroad Company ; and that vendee knew, when he bought the land, that said railroad passed through one side of this land. Knowledge of the fact that a railroad passed through the home tract does not alter the question, or change the obligations of the parties. The vendee, under his contract, had purchased one hundred and sixty-six acres, three roods and twenty-eight poles of the home tract. How much of the home tract had become vested in the railroad company

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was no concern of his. He had a right to presume that the quantity called for by his contract was still left after deducting that in the possession of the railroad company. The company had acquired a *fee simple right* to the land held by them, for which no doubt Allen had received full compensation. So far as this four acres is concerned, Allen stands in the same position as if he had sold and conveyed the four acres to another party before the sale to Triplett; and the fact that Triplett saw and knew that the Manassas Gap railroad passed through this land could have no more effect on this contract of the parties than if he saw and knew that four acres of the home tract had been sold and possession delivered to a purchaser having a deed in fee simple for four acres of said land. The contract of Allen was to convey to Triplett one hundred and sixty-six acres, three roods and twenty-eight poles, and if he had conveyed a part of it, or had received compensation for a part of it, vested by proper legal proceedings in a railroad company, it was no concern of Triplett, and Allen must make up the deficiency. The court is therefore of opinion that the decree of the said Circuit Court was erroneous in dissolving the injunction and dismissing the plaintiff's bill.

The court ought to have perpetuated the injunction certainly, to an amount sufficient to cover the deficiency in the land sold, and have proceeded to declare, upon the evidence in the cause of the value of the land and the deficiency in the value of acres proved, what amount is due to Triplett.

[The court here considered an unimportant and distinct question of fact.]

The court is therefore of opinion that the said decree of the said Circuit Court, dissolving the injunction and dismissing the plaintiff's bill, is erroneous; and that said decree be reversed, and this cause remanded to said Circuit Court, with instructions to inquire and determine what was the deficiency of the number of acres and the value thereof, and to perpetuate the injunction as to said amount, and dissolve the same as to the balance. The decree must, therefore, be reversed, and the cause be remanded to said Circuit Court to be further proceeded in in accordance with the principles herein announced.

Judgment reversed.

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GREEN v. PHILLIPS.

(26 Gratt. 752.)

Fixtures — machinery in a factory.

A building was erected and used for a factory and filled with machinery necessary for that purpose. *Held*, that the machinery was to be regarded as realty and passed with the building though it might be removed without injury either to it or the building.

BILL by Green for an injunction to restrain the sale of certain machinery on execution. The opinion states the case. The Circuit Court dissolved the injunction and Green appealed.

Berlin & Harnisbarger, for appellant.

No counsel for appellee.

CHRISTIAN, J. The controversy in this case arises between a mortgagee and execution creditors as to certain machinery in the possession of the "Harrisonburg Lumber Manufacturing and Merchandise Company."

Certain persons having entered into a partnership to build and put into operation a sash, blind and door factory, in the town of Harrisonburg, obtained from the Circuit Court of Rockingham a charter of incorporation.

This company purchased and paid for four and a half acres of land in the town of Harrisonburg, and erected a building thereon, putting into said building a steam boiler and engine, and also planing, morticing and moulding machines, and entire machinery necessary to carry out the purposes of the company in the manufacture of sash, blinds, doors, flooring, and other building material.

The company seems not to have been prosperous in their operations, becoming indebted to numerous creditors, who obtained judgments against it at different times for various amounts.

On the 11th November, 1869, the company, through its president and secretary, executed a mortgage upon its property, including land, buildings, machinery, fixtures, etc., to W. E. Green, to secure the payment of the sum of \$1,045. The deed creating this mortgage (which it appears was for the benefit of John T. Green, the appellant in this case) was not recorded until December 8, 1870.

In the meantime numerous other creditors had obtained judgments against the company. Upon some of these judgments executions were issued and levied upon certain machinery — one being levied upon what is known as a *shaper* — another being levied upon the steam engine, which runs or drives the machinery — another upon a moulding machine and two planing machines.

Upon the levy of these executions the appellant, who is the beneficial mortgagee, filed his bill of injunction addressed to the judge of the Circuit Court of Rockingham, in which, after setting forth the incorporation of the company, the object and purposes for which it was incorporated, the fact that he was a large stockholder in the company, its indebtedness to him evidenced by the mortgage above noticed, and for other debts due him; the levy of the executions upon the machinery attached to the company's building — he alleges that said machinery is all attached to the building, and constitutes *fixtures* firmly fastened to the same, and absolutely necessary to the purposes for which the factory was established; and if sold under said executions and removed, the factory would be stopped and rendered valueless. He claimed that the machinery thus levied on was part and parcel of the realty, and not liable to levy and sale, separate and apart from the building and the land. He asserts that his mortgage is prior and superior to the other judgments, and insists that if there is to be a sale, the whole property levied on, buildings and machinery shall be sold, and the different creditors paid according to the priorities of their respective claims. He also prays for an injunction to prevent the sale of the machinery levied upon, and to enjoin all proceedings under the said judgments until the various debts outstanding against the company, and the different liens and their priorities could be ascertained; and that the whole property might be sold and the creditors satisfied according to their respective rights. To this bill the judgment creditors were made parties.

An injunction was awarded according to the prayer of the bill, by the Hon. Robert H. TURNER, judge of the 14th judicial circuit. Two of the defendants answered the bill — J. D. Price and R. Ball & Co. Price admitted the large indebtedness of the company, and insisted upon a settlement of its affairs; does not object to a sale of the property to pay its debts, but suggests a private sale, instead of a sale at public auction. He denies the validity of the mortgage set up by the plaintiff in his bill; alleging that the deed exhibited therewith was executed without authority from the company, and was informal, null and void; and that if the debt is due from the company, it must stand upon the same footing as other debts. This allegation, affirmative, in the answer, as to the

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execution of the deed without authority, is not sustained by any proof, and indeed seems to be abandoned; for when the commissioner reports the debt due to William E. Green as secured by a mortgage, the report is confirmed by the court, without exception.

The only other defendants who answer the bill are R. Ball & Co. They allege that they recovered a judgment against the Harrisonburg Lumber and Merchandise Company at the May term of the said Circuit Court, 1870, for the sum of \$460.09, with interest from 31st July, 1863, and that on the 10th of June, 1870, they caused an execution of *fiery facias* to be issued from the clerk's office of said Circuit Court, and caused the same to be levied upon sash moulding machines and two planers (Daniel's & Surface's), belonging to said company. They further allege that "they are advised and so answer, that the said property so levied on is, according to the laws of Virginia, not fixtures attached — a realty exempted from levy and sale under an execution of *fiery facias* — but goods and chattels subject to such levy and sale; and they therefore deny that it is part and parcel of the freehold, or real estate; and deny that the factory would be rendered valueless by the removal of the machinery levied on." They deny that there would be any necessary injury to the complainant, or any one else, by a separate sale of the property levied on by the sheriff to satisfy the execution on their judgment, and ask that the injunction be dissolved. The other judgment creditors whose executions had been levied upon the steam engine, and the machine known as the shaper, did not answer the bill. A number of depositions were taken, and it was conclusively shown, both, that the different machines and the engine levied upon were firmly fastened to the building in which they were put up, and that *they were absolutely essential* to the purpose for which the building was erected as a factory of sash, blinds and doors, and other building material.

Two witnesses were examined by the defendants. One of them, Thomas W. Basford, in answer to the question, "How, if at all, are these machines (planers) attached to the realty?" says, "Only, so far as I know, by leather bands running on the band wheel. They ought not otherwise to be attached, any more than a table. Their weight holds them on the floor." On cross-examination, in answer to the question, "Do you know whether the machines of which you speak are actually attached otherwise than by the bands of which you speak?" says, "I cannot tell; I don't think they ever were intended to be attached; they may have been nailed to the floor."

This witness also states, that these planing machines "are essentially necessary to the company for the purpose of manufacturing, planing lumber, etc., for which they organized."

The remaining witness for the defendants says, "there is a Daniel's planer, another planer and a moulding machine in that factory. The planers are on a dirt floor, and are only attached to the realty by the bands which run on a wheel attached to a shaft, which shaft is attached to the building. The moulding machine is up stairs, on a plank floor, and, I think, screwed to the floor. I think the machine stands upon a board, which extends beyond the feet, and it is my impression the machine is fastened to this board. This board is fastened to the floor. It is also attached by bands like the planers. I worked the last machine for some nine months, and I think it ought to be fastened to keep it steady."

William C. Price, a witness introduced by the plaintiffs, says, "From the organization of the company, I was foreman in the wood department of the concern. I assisted, in connection with Mr. Scott, a regular machinist, in placing in position all the machinery except the Daniel planer. * * * There are sills 10×12 inches imbedded in the ground floor of the building, and the planer is fastened down by screw bolts to those sills. It is also connected by belts to the line shaft of the mill. * * * The line shaft is attached to the driving wheel of the engine by a belt which drives the whole machinery."

In reply to a question as to how the steam engine (which was also levied on) is fastened, he says, "There are walls built, on which sills are laid, on which the engine is placed, and fastened by bolts passing through these sills, and secured thereto. A sill then passes from the sills on this foundation to the sills in the main building, and thereto attached, lapped out, keyed and spiked." As to the Daniel planer he says: "It is placed on ties embedded in the ground floor, to which it is fastened by screws, and also by braces, which pass from the posts of the planer to the joists of the floor above, to which they are fastened by screws and nails."

With regard to the moulding machine or shaper, this witness says: "It is screwed fast to the second floor of the building, and also attached to the main line shaft or belt." He further says: "These machines could not be operated unless they were immovably fixed."

This witness expressed the opinion that these machines can be detached without serious injury to the building or to the machines.

The evidence of this witness is fully corroborated by three others, except that one of them says the surface planer could not be removed without tearing up the floor of the building. *All the witnesses on both sides agree that all these machines, with the engine levied upon, are absolutely essential for carrying out the purposes for which the company was organized, and for which the land was purchased and the buildings were erected.*

Upon this evidence, and upon the answers of the appellees, the case

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was heard upon a motion to dissolve the injunction ; and the Circuit Court, by its decree entered on the 4th day of May, 1872, dissolved the injunction it had awarded, restraining the sale of the machinery upon which the executions of *fiery facias* had been levied. It was from this decree that an appeal was allowed by one of the judges of this court.

The main question raised upon the pleadings and evidence in this cause, and which we now have to determine, is whether the machinery levied upon is of the nature of *personalty*, which can be taken under an execution of *fiery facias*, or whether they are of such a character as the law denominates *fixtures* attached to and a part of the realty, which pass to the mortgagee. It is true in this case, the deed relied upon as creating the mortgage conveys the machinery as well as the land and buildings ; but as that deed was not recorded until after the levy of the executions, it becomes important and necessary to determine whether these machines, engine, etc., are fixtures, which an execution of *fiery facias* cannot reach.

It is not necessary in this case to go into a consideration of the general doctrine of fixtures by which the nature and legal incidents of this property must be determined, or to notice the distinctions which arise with respect to this kind of property, as between landlord and tenant, vendor and vendee, and heir and executor ; which distinctions are sometimes nice and difficult ; but in this case it seems sufficient to lay down the following general rules as to this species of property : 1st. A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it. 2d. The true criterion of a fixture is the united application of the following requisites : annexation to the realty or something appurtenant thereto ; application to the use or purpose to which that part of the realty with which it is connected is appropriated, the intention of the party making the annexation to make a permanent accession to the freehold. It is true that many cases may be found which hold, that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly attached to the real estate that the connection cannot be severed without breaking or otherwise injuring the freehold. But the general course of modern decision, both in England and in the American courts, is against adopting, as the criterion for determining the character of chattels as fixtures, whether the annexation to the realty be slight and temporary, or immovable and permanent, and in favor of declaring every thing a fixture which has been attached to the realty with a view to the purposes for which it is held or employed, however slight and temporary the connection between them. See 8 Smith's Lead. Cases (7th Am. ed.), 202, and cases there cited.

In the present age, the marvelous increase of manufactures has called into existence numerous establishments, in which the building is the mere incident or accessory to the machinery or apparatus which it contains. As was said by Lord MANSFIELD, in *Lawton, ex'r, v. Salmon*, 1 H. Bl. 259. In cases of this description, to require substantial or even nominal annexation, would exclude things absolutely essential to the enjoyment or use of the freehold, and include others which are comparatively trivial and unimportant. Whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them is such that it may be severed without physical or lasting injury to either.

In accordance with this doctrine it has been repeatedly held that a steam engine, erected for the purpose of furnishing the motive power of a manufactory, is to be regarded as a fixture, or, in other words, as a part of the manufactory itself; and there are numerous cases which hold that the machinery of a manufactory is to be regarded as part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands or gearing, which may be thrown off at pleasure without injury to the freehold. See cases cited in note, 2 Smith's Lead. Cases, *supra*.

In cases where a building is erected for manufacturing purposes, the machinery gives character and value to the building, and not the building to the machinery. Each must lose its vitality and value by a separation from the other. The public good and individual interest are therefore both subserved by regarding them as substantially the same, and keeping them together.

It would seem absurd and inconsistent to make the presence of a ligature, a belt, or screw, or nail, essential to the operation of a rule, which is founded upon considerations of a different nature.

In *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306, Chief Justice SHAW in an able and well-considered opinion says: "The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to become personalty, is far from constituting a criterion. Doors, windows, blinds and shutters, capable of being removed, without the slightest damage to a house, and even though at the time of a conveyance or mortgage, actually detached, would be deemed a part of the house, and pass with it. And so we presume mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously com-

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bined as to be occasionally connected or disengaged as the objects to be accomplished may require. In general terms, I think it may be said that when a building is erected as a mill or manufactory, and the water works or steam works relied upon to move it are erected at the same time, and the machinery to be driven by them *are essential parts of it, adapted to be used with it and in it, they are parts of it, and pass with it* by a conveyance, attachment or mortgage." See, also, 1 Ohio, 511, and cases there cited.

With regard to factories and the machinery necessary to carry out the purposes for which they are erected, the cases on the subject *differ only in this* — some hold that there must be an *actual* attachment, however slight and temporary, in order to change the character of the chattels from personalty into realty; while others hold that there need be *no actual* annexation, if the machinery is essential to the objects and purposes for which the building in which the machinery is placed was erected.

In this case these distinctions, often nice and difficult, need not be considered; for in the case before us *both* of these considerations concur. The machinery *was all affixed* more or less firmly to the building; and it is admitted on all hands, that the purpose and object of the incorporation of the company, and the purchase of the land and erection of the buildings was to constitute a factory for the manufacture of sash, blinds, and doors and other building material, and that the building was a mere incident or accessory to the machinery and engine necessary and essential to carry out the primary and leading purpose of the manufactory.

The true rule deduced from all the authorities seems to be this: That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purpose for which the building is used will be considered as *a fixture*, although the connection between them is such that it may be severed without physical or lasting injury to either.

It follows, therefore, that the engine and other machinery in the factory of this company were not *personalty*, and could not be taken under the executions of *feri facias* caused to be issued by the appellees, and that the decree of the Circuit Court dissolving the injunction was clearly erroneous.

I am, therefore, of opinion that the decree of the Circuit Court dissolving the injunction be reversed, and the cause remanded for further proceedings to be had therein according to the principles herein declared.

Decree reversed.

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SWISHER V. COMMONWEALTH.

(26 Gratt. 963.)

Evidence—res gestæ—dying declarations.

J. was wounded in a fight with defendant and on the same day, while expecting to die, made certain statements in relation to the fight. He lived ten days longer, and his physicians expressed hope to him that he would recover and he said : " I hope so too," but at last died of the wounds. *Held*, that evidence of his statements was admissible on the trial of defendant for murder.

INDICTMENT for murder of James Jarvis by cutting him with a knife. On the trial evidence was introduced by the Commonwealth, tending to prove that after an altercation on the 8th of January, 1875, between the deceased and the prisoner, a fight took place between them on the same day about 7 P. M. ; and at its termination, the deceased was found to be cut or stabbed in two places in his body ; of which wounds he afterward died on the 18th of the same month. And then the Commonwealth proposed to prove certain statements made by the deceased during the night of the 8th of January ; to which the prisoner by his counsel objected, until a proper foundation for their introduction was laid. And thereupon a number of witnesses were examined by the judge in the absence of the jury. This testimony is set out in the opinion of Judge CHRISTIAN.

The court was of opinion that the testimony was sufficient to authorize the admission of the evidence, as the dying declarations of the deceased ; and the same was submitted to the jury ; and the prisoner accepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years ; and he was sentenced by the court in accordance with the verdict. The prisoner thereupon applied to a judge of this court for a writ of error, which was awarded.

J. R. Tucker, W. A. Anderson and T. N. Williams, for prisoner.

The Attorney-General for the Commonwealth.

CHRISTIAN, J. This is a writ of error to a judgment of the Circuit Court of Rockbridge.

The prisoner in his petition, and his counsel at the bar here, assign out one ground of error, and that is, that the Circuit Court erred in over

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ruling the objection of the prisoner to the introduction of the dying declarations of the deceased.

The alleged ground of the objection is, that no sufficient foundation for their introduction had been laid.

The rule of law on this subject is well settled, that to render dying declarations admissible evidence, they must be shown to have been made when the declarant is under a sense of impending death, and without any expectation or hope of recovery. When this is made to appear by proof, or by the circumstances of the case, dying declarations to identify the prisoner, or to establish the circumstances of the *res gestæ*, or to show transactions from which death results, are always admissible, to have the same weight as if made under the sanctions of an oath. For it is considered that when an individual is in expectation of impending death, all temptation to falsehood, either of interest, hope or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice. As was said in *Dunn v. The State*, 2 Pike's Rep. 229, cited in 1 Whar. 671: "When every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth — a situation so solemn and awful, is considered by the law as creating the most impressive of sanctions." Whether the dying declarations sought to be introduced were made under a sense of impending death, without any expectation or hope of recovery, is always a question to be determined by the court on all the circumstances of the case. 1 East's P. C. 357; 1 Stark. Ev. 523; *Bull's case*, 14 Gratt. 613.

Let us now apply these well-established rules of law to the case at bar. In a fight between the prisoner and the deceased, which occurred about 7 o'clock, P. M., on the 8th of January, 1875, the deceased was stabbed in two places in the body, of which wounds he died on the night of the 18th of January, 1875.

The declarations of the deceased, offered as evidence, were made *on the night of the 8th*, about two hours after he received his wounds; and the question was, whether *at that time* he had a consciousness of impending death, and *then* had no hope of recovery. It becomes necessary, therefore, to examine the testimony of the witnesses who saw him on the night of the 8th, before and at the time the declarations offered in evidence were made. George Smith, who seemed to have been present just as the fight closed, proved that deceased seemed badly hurt; said he was cut to pieces; called out to his brother to kill the prisoner if he could; that

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he then walked from the place where he was wounded to the shop of the witness, which was one hundred and twelve feet, and thence fifty-five feet further, into the house of witness, who sent for two physicians. Deceased said he could not live until the doctors came unless there was haste made. Said again he could not live, believed he would die before the doctor came; lost a good deal of blood; his pulse was weak.

Another witness, father of the deceased, proved he saw deceased about twenty-five minutes after he was wounded; was then at Smith's house. Deceased said he was badly cut. Witness told him he was excited. He replied he was not excited, and that if any of the family wished to see him they must be got there as soon as possible. He said he would not get over it. This was before the doctors came; frequently said during the same night he could not get over it.

Another witness proved that she saw deceased at Smith's house about fifteen minutes after he was wounded. He looked as if he would die; she feared he would from his appearance. He repeated several times he would die; said, "I think I am going to die;" and afterward "I will die; I will never recover." All this was about an hour before Dr. Alexander came. When his father spoke of sending for Dr. Morrison, deceased said he would die. When he said he was going to die, witness told him not to think so; that if it was ordered he should die the doctors would so tell him; that he must not be unnecessarily frightened. He made no reply then; but afterward witness heard him say he would die. Witness thought that deceased thought he would die; and it was not a mere exclamation of pain, but the expression of an opinion.

Dr. Alexander proved that he reached the deceased about 10 o'clock on the night of the 8th of January, 1875; dressed his wounds; found him excited; that he was wounded in two places, one between the sixth and seventh rib on the left side, and the other in the abdomen; found him pale, but not from loss of blood; said nothing to deceased of his condition, and heard him say nothing; gave him morphine, and he went to sleep sitting in a chair. While attending on deceased, witness was sent for to see prisoner who was cut in his hand, and on returning to deceased found Dr. Morrison with him.

Dr. Morrison proved, that he reached deceased about 11 o'clock of the night of the 8th of January. He had lost some blood; was under prostration due to shock from his wounds. * * * * When witness first saw deceased he was pale, had clammy sweat and was much prostrated; but reaction had already begun to set in. He thought when witness first saw him, he was going to die. Witness told him he might get well or might die. Witness (who was a surgeon in the Confederate

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army) told deceased he had seen many men no worse hurt than he was get well. Deceased was obviously encouraged by this, as witness thought. Afterward, later in the night, about 1 o'clock, witness was called from another room whither he had gone, to see deceased, where some attendants had undertaken to lay him down on a pallet. The effect was to pass the discharge from his wound into his lungs, suffocating him, and making respiration very distressing. Witness replaced him in his chair, where he was more comfortable; found him no worse, and he revived again, talked, and witness thought he was better. He said, however, he would die, and his wounds reasonably justified that opinion. Witness then left him for the night, being satisfied he was not then in immediate danger. The next morning he was much revived; no doubt he felt better, and obviously was satisfied he was better. For five or six days witness had good hope deceased would recover; would say to him when he visited him — "Jim, I hope you will get well;" and he would answer — "I hope so too." He said the morning after he was wounded, he felt better, and repeated the same thing on my several visits. Witness did not remember that deceased ever said in so many words, he thought he would recover; but he was certainly hopeful in opinion of witness. Witness was much encouraged about him, when about four days after he was wounded his bowels were favorably operated on. When on witness's first visit, deceased said "he thought he was going to die," witness encouraged him, felt his pulse, told him he was not dying, and he certainly was not then in a dying condition, and that as badly hurt men as he, witness had seen get well. On the night of the affray deceased frequently said he would die, and that this was not an exclamation of pain, but the expression of an opinion.

Witness thought that during the whole of the first night, up to the time he last saw him that night, that deceased was of opinion then that death was impending, and that declarations made by deceased that night, were made in view of an impending death.

Witness never heard him say he would get well, but would say he was better and felt better, and no doubt had hope. He never said in presence of witness, after first night, he thought he was going to die. Witness had hope up to within two days of deceased's death; up to that time witness thought deceased was hopeful. Witness told some of the family of deceased, that witness thought he was going to die. Perhaps his mother told him after that, she thought he would die, and to make preparations. Witness thought he had no hope after that.

Another witness, the brother of the deceased, proved, that he went for Dr. Morrison, and went in with Dr. M. to see deceased. That then de-

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ceased said he would not get well ; never heard him say otherwise. The evening before his death deceased reached out his hand and said to witness " my time is short, call all in to see me." A minister of the gospel then prayed in the house.

This was all the material evidence certified by the Circuit Court, as the foundation upon which the dying declarations were admitted.

It is urged on behalf of the prisoner, that a proper foundation was not laid for the introduction of the dying declarations, because the evidence failed to show that the deceased was under a sense of impending death *without hope of recovery* ; but that on the contrary, it was shown that he had hope of recovery ; and that therefore the evidence of his dying declarations were not admissible. To sustain this view, the evidence of Dr. Morrison is relied on ; for the four other witnesses examined on this point, all agree that they heard the deceased give no indication that he had any hope of recovery. But the testimony of Dr. Morrison, which has reference to the night on which the declarations of the deceased were made, is not, when properly understood, at all in conflict with that of the other witnesses. The testimony of Dr. M., as to the expressions which fell from the prisoner, that " he felt better," that " he hoped he would get well," and that in the opinion of the doctor he was hopeful and encouraged, manifestly refer to occasions when he saw him *after* the night of the 8th January ; for the doctor emphatically says, that on that night " he said that he would die, and that his wounds reasonably justified that opinion."

Again he says, after referring to the fact that he sometimes seemed encouraged and said he felt better, and in reply to the remark of the doctor, " Jim, I hope you are better," said " I hope so too," adds, " On the *night of the affray* deceased frequently said he would die ; and this was not merely an exclamation of pain, but the expression of an opinion. Witness thought that during the *whole of the first night*, up to the time he last saw him that night, deceased was of opinion that death was impending ; and that declarations made by deceased *on that night* were made in view of impending death."

Now it is evident, that the casual expressions of hopefulness made by the deceased, were not made on the night of the 8th of January, but at various times afterward, when encouraged by his physician that he was better, and when he may have in fact felt better. It is thus clear, that on the night of the 8th of January when the declarations offered were made, the deceased was fully impressed with the conviction that he must die of his wounds, and had not the remotest hope of recovery. The fact that he did not die immediately, or during that night, but lingered for ten

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days, and during that time gave expression to gleams of hope when encouraged by his physician, does not alter the case. The question is, always, did the deceased, *at the time* the declarations were made, have the consciousness that death was impending, and have no expectation or hope of recovery? If the declarations were made under the sense of impending dissolution, and a consciousness of the awful occasion, the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made (1 Whart. 671; 2 Russ. Crim. 757); nor by the fact that on other days, when encouraged by others, he may have expressed some slight hope of recovery, unless such expressions, taken together with all the circumstances of the case, show that he had hope of recovery when the declarations offered were made.

The fact of the declarations not being made immediately previous to death, will not exclude them, provided the deceased was conscious at the time he made them, that he was in a dying condition. 1 Greenleaf's Ev. 158; *McDaniel v. State*, 1 S. & M. 401; *State v. Poll*, 1 Hawks, 442; *Commonwealth v. Cooper*, 5 Allen, 495; *Rex v. Mosley & Morrill*, Moody's C. C. 97; referred to in 3 Rob. Pract. (old ed.) 208.

The last-named case is strikingly analogous to the one under consideration. In that case the injury that caused the death of the deceased, was inflicted on the evening of the 30th September; in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. The declarations in question were made *the same evening*. The surgeon continued to attend him until his death; which took place on the 10th of October. In his evidence the surgeon stated that previously to the 10th of October, he did not regard the case of the deceased hopeless, nor did he so represent to him; that he told him there was danger, but held out to him hopes of recovery; though he did not know whether deceased entertained hopes or not, as he never expressed to the surgeon any opinion either of hope or apprehension; but that when he saw deceased on the 10th of October he felt certain he would die that forenoon, and communicated to him the hopelessness of his state.

In consequence of this evidence of the surgeon it became material to inquire further, as to the prior hopeless state of the deceased, and his consciousness of it, from the commencement of, or during his illness, in order to ascertain whether the declarations aforesaid were admissible in evidence or not. To this point a witness stated, "that she was sent for to the deceased, on the evening of the 30th September; that he was in a very ill state indeed; that he said he was robbed and killed; that he should never get better of it; that she assisted in putting him to bed, and continued to attend him till his death: that during that time he spoke

of dying, and said he could not continue long — a few days would finish him ; that he all along said he never would get better ; that he never missed saying so one day before the latter end." Witness also stated, that she was a nurse accustomed to attend such people, and very often found them low-spirited, and have known many persons say they should never get better, who have got better ; that deceased talked in that way ; that about Tuesday before his death, he said he should not continue many days ; that it was before that he told her all about it ; that the first night he said he should not get better and continued to say so till the last day.

On this evidence it was objected for the prisoner, that a sufficient foundation was not laid for receiving evidence of the declarations of deceased made on Thursday evening the 30th of September. But HOLROYD, J., who tried the case, admitted the declarations ; and upon that and other proof the prisoners were convicted of murder. Upon a case reserved, the court, consisting of ten judges, was unanimously of opinion that the declarations were properly received. These two cases are singularly alike. In both cases the deceased lingered ten days after the fatal wounds were received. In both cases the surgeon attending did not think the wounds necessarily mortal ; and encouraged the deceased that the case was not hopeless. In both cases the declarations offered were made on the night when the injury producing death was inflicted. In both cases it is shown that the deceased on that night said he would never get over it,—that he must die, and similar expressions,—which were also used at various times during the lingering suffering of both for ten days.

In the case before us three witnesses, being those most constantly in attendance, prove that from the first night to the last (as was proved by one witness in the case cited), the deceased always said he must die.

The only difference is, that in the case before us, on one occasion several days after the declarations were made, in reply to the remark of the physician, "Jim, I hope you will get well," deceased replied, "I hope so too." This remark was the only one made, during the whole ten days, indicating that at any time there was in the mind of the deceased the slightest hope of his recovery ; but this remark, when taken in connection with the other evidence in the case and the circumstances under which it was made, does not show, or tend to show, that on the night of the 8th of January, when the declarations were made, the deceased had the slightest hope of recovery ; especially when the intelligent physician who testified to this remark, says emphatically, that during the whole night of the 8th of January, up to the time he saw him last that night, deceased was of opinion that death was impending, and that declarations made by deceased *on that night* were made in view of impending death.

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Certainly we cannot say, upon such evidence as this, that the opinion of the Circuit Court, in declaring that a proper foundation had been laid for the introduction of dying declarations, was erroneous. Much weight ought always to be given to the opinion of the court below in determining this question. The duty by law is devolved on him to determine, not only from the proofs, but from all the circumstances of the case, whether the declarations are admissible. *Bull's case*, 14 Gratt. 613; *Vass's case*, 8 Leigh, 786. That court has all the witnesses in its presence, hears them speak, can judge of their credibility, is cognizant of all the circumstances of the case, and to its judgment the law refers the determination of the question whether the declarations were admissible.

If that judgment is clearly erroneous, it may be reviewed like any other judgment. But in such a case, the same weight ought to be given to the judgment of the court below, as the appellate court gives to a judgment of the court of trial, when the motion for a new trial is overruled and the evidence certified. The judgment must be clearly erroneous before it will be interfered with by the appellate court.

In this case we have the evidence of four witnesses, among them the physician in attendance, all concurring, that on the night of the 8th of January, 1875, when the declarations were made, the deceased had no hope of recovery; and the physician in so many words declaring that the declarations made that night, "were made by the deceased under a sense of impending death." All this evidence comes before us with the sanction of the judge who heard the witnesses speak, who knew their character and credibility, and was cognizant of all the circumstances of the case.

Can we say that because, days *afterward*, not on the night when the declarations were made, the deceased expressed some vague hope that he was better, that, for that reason, all the witnesses and the judge who heard them were mistaken in their conclusion, that the deceased was without hope of recovery when the declarations were made?

This would, it seems to me, be going farther than this court or any other has ever gone, in declaring such a judgment erroneous. Upon the whole case, I am of opinion that there is no error in said judgment; that it is fully sustained by the evidence, and the legal principles which govern the case; and the same should be affirmed.

MONCURE, P., and STAPLES, J., concurred in the opinion of CHRISTIAN, J.

ANDERSON, J., dissented.

Judgment affirmed.

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(27 Gratt. 144.)

Officer — resignation of — when holding of one office disqualifies for another.

A person holding a lucrative office under the United States government was elected sheriff of a county for the term commencing July 1, then next. On the 19th of June he sent in his resignation of the Federal office to take effect on the 30th of June. The resignation was not accepted until July 2, and on the morning of July 1st he completed his duties as such officer before attempting to act as sheriff. *Held*, that his term of office had not expired on July 1st, and that, therefore, he was disqualified from holding the office of sheriff under a statute providing that no person holding a post of profit under the United States government should hold any State office.

APPPLICATION for a *mandamus* to WILLIS, judge of a County Court, to compel him to restore the applicant, Bunting, to the office of sheriff. The Circuit Court refused the application and Bunting applied to this court for a writ of error, which was awarded. The opinion states the case.

Goodwin & Crocker, for appellant.

Peck, for appellee.

MONCURE, P. This is a writ of error to a judgment of the Circuit Court of the county of Elizabeth City, discharging a rule in the nature of a *mandamus nisi*, which had been awarded by said court on the petition of the plaintiff in error, R. P. Bunting, against Hon. W. R. WILLIS, judge of the County Court of said county, and Jerome Titlow, defendants in error, to show cause why a peremptory *mandamus* should not be awarded to the said plaintiff, commanding the said judge to admit or restore said plaintiff to his office of sheriff of said county, then held by the defendant Titlow.

Bunting having received the highest number of votes at the general election held May 27th, 1875, was elected sheriff of the county of Elizabeth City. On the 25th day of June, 1875, he qualified as such before the said County Court by taking the necessary oath, and giving bond, with approved security, as required by law, and on the 1st day of July, 1875, he entered upon the duties of the office.

Afterward, and during the same term of the said County Court, to wit: on the 3d day of July, 1875, the said Titlow, claiming to be sheriff of said county, moved the said court to set aside the order qualifying he

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said Bunting as such sheriff, entered into on the second day of the said term, and to declare the same null and void, together with the bond entered into by the said Bunting and his sureties, upon his qualification as said sheriff, upon the ground that he was at the time of said qualification, and was then incapable of holding the said office under the second section of chapter 11 of the Code of 1873. And the said Bunting appearing, and the said motion having been continued from time to time afterward during the same term, to wit: on the 8th day of July, 1875, the said County Court, on full consideration of the case, being of opinion that the said order, entered into on the second day of the said term, was erroneously entered, and that the said Bunting was improperly and illegally admitted to qualify as sheriff of said county as aforesaid, and was not capable of holding said office of sheriff by reason of his holding an office of trust and emolument under the United States government, ordered that the order entered on the second day of the term as aforesaid should be set aside and annulled. And the said County Court being further of opinion that said Jerome Titlow, as sheriff of the county, held over until his successor in office should legally qualify, ordered that the said Titlow should be recognized as such sheriff until his successor should qualify as aforesaid. To which ruling of the court the said Bunting excepted, and asked leave to file his bill of exceptions, which leave the court refused, upon the ground that his proper remedy was not by writ of error, but by *mandamus* or *quo warranto*.

Accordingly, the said Bunting applied to the judge of the Circuit Court of said county for a rule in the nature of a *mandamus nisi*, which was awarded as aforesaid, and executed upon the defendants. After which, to wit: on the 30th of July, 1875, the defendants filed the answer of Judge WILLIS to the said rule, to which answer the plaintiff, Bunting, filed a demurrer, and entered a plea, in which demurrer the defendants thereupon joined. The plea was, that the "part of the return to the *mandamus nisi* that alleges that the plaintiff held a United States office, to wit: the office of deputy inspector of customs at Fortress Monroe, Virginia, an office of profit, trust and emolument, on the 2d day of July, 1875, or after he, the said plaintiff, had entered upon the discharge of the duties of sheriff of Elizabeth City county, is not true."

Afterward, to wit: on the 4th day of August, 1875, the said Circuit court, having fully considered the matters of law arising upon the plaintiff's demurrer, was of the opinion that said answer was sufficient, and overruled the demurrer thereto; and the plaintiff admitting the allegations of said answer not traversed by his said plea, issue was thereupon joined on said plea; and neither party requiring a jury, but submitting

the matters of law and fact arising from the evidence and argument of counsel to the court, judgment was thereupon rendered against the plaintiff, discharging the said rule, and for the defendant's costs; to which judgment the plaintiff excepted.

On motion of the plaintiff, and by consent of parties, a rehearing of the cause was granted; after which, to wit: on the 21st day of August, 1875, the cause having in the meantime being further heard, and the court having taken time to consider, the court, on full reconsideration of the matters of law and fact arising in the case, and the arguments of counsel, confirmed the judgment entered in the cause on the 4th day of the same month.

In the bill of exceptions which was taken in the case by the plaintiff, the facts, or evidence proved on the trial, were certified.

The respondents (Judge W. R. WILLIS and Jerome Titlow), to maintain the issue on their parts, proved the following facts, to wit: "That on the 24th day of June, 1875, and for some time prior thereto, R. Paul Bunting held the office of deputy collector and inspector of customs at Fortress Monroe, Virginia; that the said office was and is an office of profit, trust and emolument, under the government of the United States, paying to the incumbent thereof an income of four dollars per day as a salary; that on the 19th day of June, 1875, the said Bunting sent in his resignation of said office, to take effect on the 30th of June, 1875; that the said resignation was not accepted, or any official action indicating its acceptance taken, until the 2d day of July, 1875; that on the 2d day of July 1875, about five o'clock in the afternoon of that day, William Webb, an employee of the United States Custom House of Norfolk, Virginia, under instructions of Luther Lee, Jr., collector of customs, relieved the said Bunting as United States deputy inspector and collector of customs at Fortress Monroe; that on the 1st day of July, 1875, about nine o'clock in the morning, the said Bunting, in the discharge of the said duties of the said office of deputy inspector and collector, cleared the American brig 'Katahdin,' and issued to her clearance papers over his signature and in the capacity of deputy inspector and collector of customs as aforesaid, having two days before commenced the papers of the clearances of said vessel."

And the said R. P. Bunting, to maintain the issue on his part, proved the following facts by both oral and record testimony, to wit: "That on the 27th day of May, 1876, he was duly elected sheriff of the county of Elizabeth City, and State of Virginia:" and here is inserted the certificate of said election. "That on the 25th day of June, 1875, he duly qualified as sheriff of said county, before the County Court of said county

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then in session, presided over by Judge W. R. WILLIS, the judge of said court, by taking the necessary oath, and giving the bond with approved security :” and here follows the order of qualification. “That on the 1st day of July, 1875, about the hour of twelve o’clock A. M., he took formal possession of the said office of sheriff, and continued in the said office, performing the duties thereof, until the 8th day of July, 1875; that on that day one Jerome Titlow moved the said judge of the said court, through his counsel, to revoke the order of the 25th day of June, 1875, qualifying the said R. P. Bunting as sheriff aforesaid; that upon argument and consideration the said judge of said court did revoke said order of qualification, and did dispossess him the said Bunting of the said office of sheriff :” and here follows the order of revocation. “That prior to, and at the time of his qualification as sheriff aforesaid, to wit: on the 26th day of June, 1875, he held the office of deputy inspector and collector of customs at Fortress Monroe, Virginia; that after his election, to wit: on the 19th day of June, 1875, he resigned the office of United States deputy inspector and collector, to take effect on the 30th day of June, 1875 :” and here follows the letter of resignation in these words :

“CUSTOM HOUSE, FORT MONROE, VA.,

“Collector’s Office, *June 19th*, 1875.

“HON. LUTHER LEE, JR.,

“Collector of Customs. Norfolk. Va. :

“MY DEAR SIR :—After five years of continued service as an inspector of the customs for the port of Norfolk, and under your personal supervision, I beg leave to hand my resignation, to take effect June 30th, 1875.

“Being one of the first to receive an appointment at your hands, on your assuming the position of the collectorship of the port above stated, it gives me pleasure to say, that the past five years have been as pleasantly and agreeably spent as any of my past life, and I assure you it is with much regret that I am forced to hand you my resignation; but business of a private nature demands my immediate and personal attention, and I therefore beg you will be pleased to accept it in the same good feeling in which it was written.

“You will be pleased to permit me to extend to you and the officers under you my sincere and hearty thanks for the many courtesies extended to me since my connection with you, both officially and socially.

“With best wishes for your future prosperity, I beg leave to remain your sincere friend and ob’t servant,

“R. PAUL BUNTING.”

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Under which letter is a certificate, under the hand and official seal of the collector, dated July 5th, 1875, that said letter is a true copy of the original on file in his office.

“ That on the 28th or 29th day of June, 1875, the papers of the American brig ‘ Katahdin ’ were placed in his the said Bunting’s hands for clearance. That all the necessary papers, except the hospital returns and his signature as deputy collector, were made out and completed on the said 28th or 29th day of June, 1875 ; that on the 1st day of July, 1875, having two or three days previously commenced the clearing of the said brig ‘ Katahdin,’ he completed the said clearing ; that this was about nine o’clock A. M., and before he had done any act in the office of sheriff aforesaid ; that on the 2d day of July, 1875, W. T. Webb took charge of the said office of United States deputy collector and inspector of customs, and continued to act as said officer until the 8th day of July, 1875, when the said office was filled by H. Libby, duly appointed, and who holds the said office to this date.” And the said Bunting in his evidence states, “ that from and after nine o’clock A. M. of the 1st day of July, 1875, he ceased entirely to have any thing to do with the said office of deputy inspector and collector of customs at Fort Monroe, and that his damages, including his attorney’s fee in this case, amount to about \$800.”

Whereupon the court, being of opinion that the said Bunting was not entitled to recover the said office, gave judgment for the respondents ; to which opinion the said Bunting excepted.

The Code, chap. 11, § 2, p. 174, declares that “ no person shall be capable of holding any ” post of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of this Commonwealth, “ who holds any post of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of the United States, or who receives in any way from the United States any emolument whatever.”

It is not denied, and there can be no question, but that, first, the office of sheriff is a post of profit, trust and emolument, under the government of this Commonwealth ; and, secondly, the office of deputy inspector and collector of customs at Fortress Monroe, Virginia, which was held by the plaintiff Bunting at the time of his election as sheriff of the county of Elizabeth City on the 27th day of May, 1875, was a post of profit, trust and emolument, under the government of the United States ; within the true intent and meaning, and indeed the express terms, of the said provision of the Code.

There is also a provision of the Constitution of the State (art. 7, § 6.

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Code, p. 92), which declares that "sheriffs shall hold no other office." This provision is no further material to this case, than to show the intent of the framers, as well of the Constitution as of the law of the State, that a sheriff shall hold no other lucrative office, whether under the State or Federal government. We will, therefore, not notice any further the constitutional provision aforesaid.

When the plaintiff was a candidate for the office of sheriff under the State government he certainly held the office of deputy inspector and collector of customs under the Federal government; and it does not appear that he had then any idea of resigning the latter office, at least unless he should be elected to the State office; in which event he may have intended to tender his resignation of his Federal office, to take effect when he would have to enter on the duties of the State office. A question might well be raised, whether a person who holds a lucrative office under the Federal government is eligible to the office of sheriff under the State law. To be sure that law does not expressly declare that he shall not be eligible to, but only that he shall not be capable of holding, any such post, etc. We can see some reason for using the latter rather than the former language, as it may have been intended to have the effect of preventing, not only a Federal officer from being elected to a State office, but also a State officer from receiving a Federal office without *ipso facto* vacating his State office. It may seem strange, that a person should be eligible to a State office, which he is incapable of holding after being elected. The law says nothing about his resigning, before entering on the duties of his State office, any Federal office which he may hold at the time of his election. It is at least optional with him, whether he will resign his Federal office or not; and whether his election to the State office would be effectual or not would depend on the contingency of his future resignation in time to enter on the duties of the State office.

The Federal office might be held by fraud contemporaneously with the State office. We do not mean to say that such was the case here; but there is danger in such a case. And the best way to guard against it would seem to be that the Federal officer should not be eligible to the State office, until he has clearly and entirely rid himself of the Federal office. Otherwise there will be a painful uncertainty after the election who the State officer is, until some unmistakable act of resignation shall have been executed. There is a manifest difference between offices held under the same government, and offices held under different governments, as under the State and Federal. In the former case, the whole matter is under the control of one and the same government, and the acceptance

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of one office is *ipso facto* a vacation of another, incompatible therewith, and previously received. But, in the latter case, an acceptance of a State office does not vacate a previously received Federal office, however incompatible they may be. In the cases referred to in the argument, in which it has been held that a person holding one office may, while he holds it, be elected to another and incompatible one, seem to be all cases in which the offices were held under the same government.

But without expressing any opinion upon that question, and conceding, at least for the purposes of this case, that the plaintiff was eligible to the office of sheriff, though at the time of the election, and for some time thereafter, he held the Federal office, then the question arises, whether he was completely divested of the Federal office before he was invested with the State office; in other words, whether he held both offices at one and the same time, however short may have been the time of such holding. The law prescribes no limitation as to the time of holding. "No person shall be capable of holding" for an instant any more than for a year. The instant he holds a Federal office he must cease to hold his State office.

The office of sheriff commenced on the 1st day of July, 1875. Did the Federal office cease before that day? Did he perform any duty of the latter office after or on that day? This is the question we now have to consider and decide.

The plaintiff was elected to the office of sheriff on the 27th of May, and he tendered his resignation on the 19th of June thereafter. But it was not to take effect immediately. It was to take effect on the 30th of June, 1875, the day before the term of the office of sheriff legally commenced. But did it then take effect? or was it held longer? If it was held any longer, no matter how short the period, he was incapable of holding the office of sheriff.

That he had a right to resign his Federal office, and that such right does not depend upon the consent or acceptance of the government or its agents, seems to be very well settled. That after such a resignation becomes complete it cannot be withdrawn by the officer, even with the consent of the government, seems also to be settled, though he may receive a new appointment, which may perhaps be given to him in the form of a withdrawal by consent of his resignation of his former office.

But a prospective resignation may be withdrawn at any time before it is accepted: and after it is accepted it may be withdrawn by the consent of the authority accepting, where no new rights have intervened. This was held by the Supreme Court of Indiana, in *Biddle v. Willard*, 10 Ind. 62, and seems to be a reasonable principle. We have seen no case to the

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contrary, while there are other cases which tend to sustain it. *The State v. Hauss*, 43 Ind. 105; *The People v. Porter*, 6 Cal. 26; *State v. Boecker*, 56 Mo. 17.

The resignation of the office of deputy inspector and collector in this case was prospective; to take effect June 30th, 1875. It was not accepted by the collector until after that time. There can be no doubt but that until that time it was competent for the plaintiff, at least with the consent of the collector, to withdraw his resignation, either entirely or for a limited period. From the terms of the letter of resignation, it is plain that the plaintiff would have consented to withdraw his resignation for a limited period or purpose, if the exigencies of the public service required it, especially if he supposed that he would not thereby lose his office of sheriff.

It clearly appears in this case that the plaintiff acted as deputy inspector and collector after the 30th of June, to wit: on the 1st of July, 1875; and so acted with the consent of the collector. It is certified as a fact proved in the cause, "that on the 1st day of July, 1875, about nine o'clock in the morning, the said Bunting, in the discharge of the said duties of the said office of deputy inspector and collector, cleared the American brig 'Katahdin,' and issued to her clearance papers over his signature, and in the capacity of deputy inspector and collector of customs as aforesaid, having two days before commenced the papers of the clearance of said vessel." This act could only have been done by withdrawing the resignation so long as was necessary for the purpose. In fact, the plaintiff did not go out of office before the 2d day of July, 1875, it being certified as a fact proved on the trial, that "about five o'clock in the afternoon of that day, William Webb, an employee in the United States custom-house at Norfolk, Virginia, under instructions of Luther Lee, Jr., collector of customs, relieved the said Bunting as United States deputy inspector and collector of customs at Fortress Monroe." Thus it appears that Bunting went out, and Webb came into this office about five o'clock, P. M., on the 2d of July, 1875, after the term of the sheriffalty for which Bunting had been elected commenced. It seems to be supposed that the facts certified, as proved by Bunting, are more favorable to him than those proved on the other side. But there is not any conflict between them, and if there were we would have to prefer that view of the facts which tends to sustain the judgment to that which tends to the contrary.

When was Bunting's letter of resignation of the 19th of June, 1875, received by Lee? Was any answer made to it? And if so what was the answer? On none of these subjects does the record give any in

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formation. If Lee had answered the letter of Bunting, accepting the resignation as it was tendered, or containing any thing else at all favorable to Bunting, it would have been produced by him. We may infer, therefore, from the non-production of such an answer that it was not written or was not favorable. It does not appear that the letter of resignation was filed or received by Lee until the 5th of July, 1875, the date of his certificate, which was after the controversy in the County Court for the office of sheriff between these parties had commenced, which was on the 3d of July. It is not stated by Bunting when his letter of resignation was actually written; and even the date of his resignation is stated under a *scilicet*, as on the 19th of June, 1875. If Bunting received no answer from Lee stating that his letter of resignation was received and filed, he could not have considered his resignation as accepted and complete. It does not appear that he received any such answer until after the 2d of July, on which day, about 5 o'clock in the afternoon, Bunting was relieved by Webb. Continuity of the office seems to be required by public necessity. Even the short period of six days between the 2d and the 8th of July was filled up by the temporary appointment of Webb, an employee in the custom-house, and on the 8th the office was permanently filled by the appointment of Libby.

In this case, the most we can say for Bunting, even if we can say that, is that the case is a doubtful one upon the merits. So considering it, we would have to affirm the judgment in conformity with the opinion of the County Court and of the Circuit Court, both of which courts saw and heard the witnesses, and the latter of which stood in the place of a jury by agreement of the parties, and after giving judgment for the respondents, on full argument and consideration, granted a rehearing, and then upon reargument and reconsideration affirmed the former judgment.

Upon every principle, therefore, we must affirm the judgment of the Circuit Court upon the merits.

[The court then briefly considered the question of the authority of the County Court in the matter.]

Whether the County Court could properly have refused, or not, to permit Bunting to qualify as sheriff; or, having permitted him so to qualify, could, afterward, during the same term, properly set aside the qualification or not, it is very well settled, that if Bunting is not now, and was not when he obtained a rule for writ of *mandamus*, entitled to the office of sheriff, he cannot be admitted or restored to it on such writ.

In *Chew v. The Justices of Spotsylvania*, 2 Va. Cas. 208, it was held that the removal of a justice of the peace with all his family from his county to another, and remaining there for several years (although he afterward returned), is either an abandonment, virtual resignation, or

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forfeiture of his office; and whether void or only voidable by a judicial proceeding eventuating in a judgment of annulment, no *mandamus* ought to issue, to invest the applicant with an office not belonging to him, if void, or which might be taken from him, if voidable.

In *Amory v. The Justices of Gloucester*, id. 523, it was held that the offices of deputy clerk of a County Court and a justice of the peace of the same county are incompatible offices, so that they cannot both be held at the same time; and whether the acceptance of the office of deputy clerk vacates the office of a justice of the peace, or not, the Superior Court will not grant a *mandamus* to compel the County Court to admit the applicant to an office not belonging to him, if void, or which might be taken from him, if voidable.

In *Poulson v. The Justices of Accomac*, 2 Leigh, 743, it was held that a justice of the peace of the county of Accomac, who left this State with intent to establish his residence in another, and remained there nine months, but did not establish his permanent residence there, and then returned and resumed his former residence in Accomac, had no right to resume the exercise of his office of justice of the peace of Accomac. UPSHUR, J., delivered the resolution of the court, that the case was not distinguishable in principle from the case of *Chew v. The Justices of Spotsylvania*, *supra*, and upon the authority of that case the court was unanimously of opinion that the *mandamus* ought not to be awarded.

The remedy by *mandamus* seems to be a proper remedy in cases of this kind, and has been the one usually pursued, no doubt because, if not the only specific legal remedy, it was, at least, the most convenient and complete, in which cases the court exercises a sound discretion in granting or refusing the writ.

We think, therefore, the Circuit Court did not err in discharging the rule for a writ of *mandamus* and refusing to award the said writ.

But one more observation occurs to us as proper to be made in this case; and that is, that Bunting having become incapable of holding the office of sheriff, at least by acting in his Federal office after the term of his sheriffalty had commenced, he thenceforward at least ceased to be sheriff, and no act of his afterward in throwing off the Federal office could restore him to the State office, nothing could do so but a re-election and requalification to the latter. If it be necessary to cite authority in support of that principle, it may be found in the *Commonwealth v. Sherard*, 4 Leigh, 643; though it is no doubt sustained by many cases, if it be not a self-evident proposition.

Upon the whole, we think there is no error in the judgment, and that it ought to be affirmed.

CHRISTIAN, J., dissented.

Judgment affirmed.

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SANDS v. LYNHAM.

(27 Gratt. 291.)

Alien — real estate of — descent — interest of state.

An alien possessed of real estate, died intestate without any known heirs. *Held*, (1) that the real estate vested in the State, without office found ; (2) that a sale of such real estate to satisfy a debt against the alien in a proceeding to which the State was not made a party, was void as to the State ; but (3) that the purchaser at such sale was entitled to be substituted to the rights of the creditor and, if the claim was just, to have the real estate subjected to its payment.

SOLOMON HAUNSTEIN, of foreign birth, died seized of an estate of inheritance in six houses and lots in the city of Richmond. He was unmarried and died intestate ; and his estate was committed to Richard D. Sanxay, as curator. In March, 1867, Wm. Gleason, as assignee of John W. Thompson, recovered a judgment by default against Sanxay as curator of Haunstein's estate, for \$7,000, with interest from April 1st, 1861 ; and in April, 1867, in a suit brought by Gleason against Sanxay as curator in the Circuit Court of Henrico, in which the bill and answer were presented at the same time, and the cause docketed by consent, the court made a decree appointing Sanxay a commissioner to sell the real estate of Haunstein, to receive the purchase-money, and convey the property to the purchaser ; and out of the proceeds of the sale pay off the judgment recovered by Gleason. A copy of the decree and of the judgment are the only parts of the record in that case which have been filed in this ; but there are two deeds, one from Sanxay as commissioner, to Johnson H. Sands, as the purchaser of two of the lots of Haunstein, and the other from Mary J. Wilkinson, who had been a purchaser at the sale by Sanxay, to Sands of the lot so purchased by her.

In May, 1868, an inquisition of escheat was held by Samuel M. Page, escheator of the city of Richmond, when the jury found Haunstein did die seized of an estate of inheritance in the said six lots ; that he died intestate and without heirs, and that there was no person known to the jury to be entitled to said lots ; but that they had been by a decree of the Circuit Court of the county of Henrico, sold to satisfy an office judgment obtained against the estate of Haunstein since his death ; and that there were then at the time of the said inquisition certain parties in possession of said lots claiming them under said sale.

Page did not return his certificate of said inquisition to the register of the land office until June, 1869 ; and the register then advertised the property as escheated.

On the 10th of July, 1869, Johnson H. Sands filed his petition in the

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Circuit Court of the city of Richmond, in which he set up his claim to the three of the Haunstein lots which he had purchased as before stated ; he pointed to certain irregularities in the proceedings to escheat the property, and he insisted that the jury having found the sale of the property under a decree of the court, and the actual possession by the purchasers at that sale, the inquisition was not in favor of the right of the Commonwealth to the said lots. And he prayed that Page might be made a party defendant to his petition and required to answer the same ; and that the register of the land office might be made a party and enjoined from advertising the property as escheated ; that the court would declare the land not escheated to the Commonwealth, and for general relief. The injunction was granted.

A copy of the order of injunction having been served on Page and the register, and Page not having appeared or made any defense, on the 17th of July, the court took up the case, and being of opinion that the verdict of the jury of inquisition shows upon its face that the real estate mentioned therein was not liable to be escheated, and that the proceedings of the defendants under said verdict were wholly irregular and illegal, made a decree perpetuating the injunction.

In January, 1870, Page, the escheator, by leave of the court, filed his bill to review the decree of the 17th of July, 1869. He stated his excuse for not having filed his answer in the short time before the decree was made. He insists that the proceedings on the inquisition were regular, that the petitioner had no title to the property, and it was error to proceed to decree upon the petition until the escheator had filed his answer ; as was expressly provided by the statute. Code, 118, § 8.

Sands demurred to the bill, and also answered ; but the court overruled the demurrer, and set aside the decree of July 17th, 1869, on the last ground stated in the bill of review. And John A. Lynham having succeeded Page as escheator, he was substituted as defendant and directed to file his answer.

Lynham in his answer insisted that the matters stated in the petition were insufficient in law and equity to entitle the plaintiff to the relief he sought, or any other relief in the premises against the Commonwealth or her officer or agents : that the finding of the jury as to the sale of the lots was wholly irrelevant to the proper finding in said inquisition, etc., etc.

The cause came on to be heard on the 16th of June, 1874, when the court made a decree dissolving the injunction and dismissing the petition with costs. And thereupon Sands applied to this court for an appeal ; which was allowed.

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Young & Meredith, for appellant.*The Attorney-General*, for appellee.

STAPLES, J. The inquisition finds that Solomon Haunstein died seized of an estate of inheritance in the lots in controversy; that he died intestate and without heirs, and that there is no person known to the jurors to be entitled to the same; but that said lots have been sold by a decree of the Circuit Court of Henrico county to satisfy an office judgment obtained against the estate of Solomon Haunstein since his death, and that there are now certain parties in possession of said lots claiming under said decree.

It is proper further to state, though it is not part of the inquisition, that the decree referred to was rendered on the 29th April, 1867, in a suit brought, or purporting to have been brought, by William Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein. No copy of the bill, or of any exhibit in the record of that suit, is filed in this. It does not appear that any order of publication was ever made in the cause, or that there was any party defendant other than Sanxay, the curator. It would seem that the bill and answer were filed on the same day, and on that day the cause was brought on for a hearing by consent, and a decree rendered for a sale of the lots now in controversy.

Upon this state of facts we are to determine what are the rights of the purchasers under that decree. In order to arrive at a satisfactory conclusion upon that point, it becomes necessary to inquire what was the precise status of the real estate of Solomon Haunstein upon his dying intestate and without heirs. Was the title thereto immediately vested in the Commonwealth, or was an inquest necessary to effect that object.

It is well settled that an alien may take lands by grant. But while he has capacity to take, he has none to hold, and the lands may at once be seized to the use of the State. But until they are so seized, the alien has complete dominion over them, and his title cannot be divested except upon office found.

And so if lands are devised to an alien, he acquires a complete though a defeasible title by virtue of the devise; and this title can only be taken away by an inquest of office, which must be perfected by entry or seizure where the possession is not vacant.

In these cases, and there may be others, it seems that the inquisition is necessary, to vest a complete and perfect title in the State.

An alien cannot, however, take by descent, because the law will never

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cast the freehold upon one who is incapable of holding, and as the freehold can never be kept in abeyance for an instant, in such cases it vests immediately in the State without inquest of office.

For the same reason, if an alien dies intestate, or a citizen dies without inheritable blood, his lands belong to the State. They vest immediately without office found. They sink back into their original condition of common property for the general benefit. The rule on this subject is thus laid down by Chancellor KENT in 4th Vol. of Com., p. 423: "It is a general principle in the American law, and which I presume is everywhere declared and asserted, that when the title to land fails from a defect of heirs, it necessarily reverts to the people, as forming the common stock to which the whole community is entitled. Whenever the owner dies intestate, without leaving any inheritable blood, or if the *relatives* he leaves are aliens, there is a failure of competent heirs, and the land vests immediately in the State by operation of law. No inquest of office is necessary in such case.

In *Montgomery v. Dorion*, 7 N. H. 475, a well-considered case, the following propositions are laid down:

"If an alien purchase lands and die, the lands instantly vest by escheat in the State, without any inquest of office. But while the alien lives, the lands cannot vest in the State without office found.

"In this State (New Hampshire) the lands of which a citizen dies seized, without heirs, reverts in all cases to the State; provided he dies intestate. Upon principle, it would seem that lands must in such a case vest immediately in the State without any inquest of office, as they do in England in the crown when the king's tenant dies without heirs.

"There might be cases in which an inquest of office might be expedient, as where one person is found in possession, claiming as heir or otherwise; but an inquest of office is in no such case essential to vest the title in the State."

In support of these positions numerous other authorities might be quoted; but a simple reference to the cases is all that is necessary. *Moore v. White*, 6 Johns. Ch. 360; *Jackson v. Beach*, 1 Johns. Ch. 399; *Stevenson v. Dunlap's Heirs*, 7 Monr. 134; *Fry v. Tucker*, 2 Dana, 38; *Johnson v. Hart*, 3 Johns. Cas. 322; *Collingwood v. Pace*, 1 Sid. 193; *Stokes v. Dawes*, 4 Mason, 268; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *O'Hanlin v. Den*, 1 Spencer, 81; *White v. White*, 2 Metc. (Ky.) 185; *Hinkle's Lessee v. Shadden*, 2 Swan, 46.

The case of *Commonwealth v. Hite*, 6 Leigh, 585, is not in conflict with these authorities. That was an information for intrusion on land of the commonwealth. Being in the nature of an action of trespass *quare*

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clausum fregit, it will not be maintained except in the case of actual possession. And the chief, if not the only question, was, whether the effect of an inquisition of office was to vest the possession in the State. It was held by this court, that when the possession of escheated lands is vacant at the time of office found, the effect of that proceeding is at once to vest the State with possession. If the possession is not vacant, it does not become so vested, and an entry or seizure by the State is essential in order to maintain an information for intrusion. This was the sole point decided by the court. It is very true that some expressions fell from Judge TUCKER to the effect that the Crown can only take by matter of record. All of which is strictly accurate as applied to an alien claiming by *grant or by devise*. He is in by title, having the freehold, which can only be divested by some act in the nature of a judicial proceeding: because the king may not enter upon or seize any man's possession upon bare surmises, without the intervention of a jury.

But as, according to the common law, lands cannot be in abeyance or without any owner even for a single minute, it follows necessarily that upon the death of the person last seized, without heirs capable of inheriting, the title must immediately vest in the State without office found.

The doctrine of escheat is originally derived from the old feudal law. An inquisition does not constitute an escheat. It is simply the means by which the State furnishes authentic record evidence of her title. The word "escheat" is derived from the French, and properly signifies the falling of the lands by accident to the lord of whom they are holden, in which case the fee is said to be *escheated*. It is a species of reversion by which, upon the death of the tenant without heirs, the lord becomes entitled to the estate. While at common law a writ of escheat was necessary to vest the estate in the lord, when the king became entitled upon the death of the tenant without heirs capable of inheriting, no office was necessary; but he might enter and cease without judicial proceeding, because in such cases the freehold was cast upon him by law in actual possession.

In this country the doctrine of escheat rests upon the broad principle, that when the title to land fails from defect of heirs, or when from any cause there ceases to be an individual proprietor of the land, it reverts back to the community. 1 Lomax's Dig. 774, 777; 8 Green's Cruise on Real Prop. 218. In such cases the title being in the State upon the death of the owner, no inquest of office is necessary.

If the possession be vacant at the death of the owner, both title and possession are at once transferred to the State. If, on the contrary, the

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land be held by adversary possession, the State must enter by her officers. Such an entry may perhaps be necessary to enable the State to make a valid grant of the land, or to maintain an information for intrusion ; but it is not essential to the title, any farther than possession is to be considered an element of title.

The State, of course, takes the lands subject to any liens created by the owner, and also to any valid debts contracted by him. But so does the heir, if there is one. The title is none the less complete, because perchance the land may be taken to satisfy the claims of creditors.

In the case before us, upon the death of Solomon Haunstein intestate, without heirs, his real estate became vested *eo instanti* in the State ; the possession being vacant, was also transferred along with the title. Whoever entered into the possession, did so in subordination to her title. When, therefore, the jury of inquest found that certain persons were in possession of the lots at the time of the inquisition, which was more than two years after the death of the owner, they found an immaterial fact, which did not affect the title previously acquired by the State.

It seems, however, that the appellant was one of the persons in possession, claiming title to the property under the decree of the Circuit Court of Henrico county. And it is insisted that this decree, having been rendered by a court of competent jurisdiction, is conclusive of every question decided by it until reversed by some proper proceeding instituted in the court which pronounced it.

No one will maintain that the decision of a court, having jurisdiction of the subject-matter in a case before it, can be collaterally drawn in question for any errors therein, or in the proceedings which led thereto. But it is equally beyond controversy, that a decree, however regular in its forms, only binds parties and privies : it cannot affect the title of a person not before the court. The exceptions to this rule are very few, and have nothing to do with the matter in controversy. It may be that a purchaser at a judicial sale is not affected by errors in the proceedings which led to the decree. He certainly is affected by a want of proper parties before the court. In this State he takes all the risks of the title. He is bound at his peril to see to it that the persons having title to the property are parties to the suit. Without this, no act of the court can give him a valid title. The curator of Solomon Haunstein's estate was the only party defendant to the suit in which the decree of sale was rendered. He had nothing to do with the real estate ; not the shadow of a title to, or interest in it. If the appellant acquired title by his purchase, whose title did he acquire ? Certainly not Solomon Haunstein's, as all his interest terminated with his death ; not that of any heirs, as there were

none in existence. The title of the State? It is not pretended. Her rights could not be affected by any orders or decrees in a suit to which she was not a party. If authority were needed to sustain so plain a proposition, it may be found in the case of *Hudgin v. Hudgin's Ex'or et al.*, 6 Gratt. 320. The decision of this court in that case is conclusive upon this branch of the present case.

It is very questionable, to say the least, whether the general statutes, making real estate assets for the payment of debts, and authorizing suits in equity for the sale and administration of the same, apply to escheated lands. The design of those statutes was to give to creditors a remedy against heirs and devisees in the event of a deficiency of personal estate; and all the provisions have reference to lands which have been devised by will, or have descended upon heirs in cases of intestacy.

In cases of escheated lands, the 27th section of chapter 113, Code of 1860, prescribes the mode by which the creditor may enforce his demand against the realty, where there is no personalty. It is very true that this section only provides for those cases in which there has been an actual inquest of office. It has been argued that the creditor may be delayed for years, if he is compelled to await an inquisition before instituting proceedings to enforce his demand. It will be seen, however, upon an examination of the various provisions in regard to escheats, that but little difficulty is likely to occur in this respect. Each commissioner of the revenue is required annually to furnish a list of lands in his district of which any person shall have died seized of an estate of inheritance, intestate and without any known heir. On receiving such list, or upon information from any person in writing and under oath, the escheator is required at once to hold inquest to determine whether the lands have escheated to the Commonwealth. Code of 1860, 113, §§ 3 and 4. These provisions afford to the creditor the fullest means of enforcing prompt action on the part of the State in the assertion of his claim; while the 27th section gives to him adequate remedies for the recovery of his demand. Any small delay that may occur by this course bears no sort of comparison to the mischiefs which will result from the establishment of a contrary doctrine. To hold that upon the death of a person without known heirs, any one claiming to be a creditor may file a bill in equity, with a personal representative perhaps in the interest of the plaintiff as the only defendant, and obtain a decree for the sale of the real estate, and thus divest the title of the Commonwealth, is to open the door to the perpetration of the grossest frauds and injustice. The claim may be wholly fictitious. The sale of the lands may be altogether unnecessary. And even if necessary, they may be sold at the most ruinous sacrifice.

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Who is to protect the interests of the State against abuses and frauds of this description? It is impossible to foresee the mischiefs that will ensue if this court shall establish a rule of this sort.

This identical question has been the subject of adjudication in other States. In every case I have seen it has been held, that upon the death of the owner of lands, intestate, without heirs capable of inheriting, the title, *eo instanti* and before office found, vests in the State; and the title could not be divested by a sale made under the decree of any court, unless the State in some form is a party to the proceeding. *Hinkle's Lessee v. Shadden*, 2 Swan, 46; *O'Hanlin v. Den*, 1 Spenc. 31, 43; 1 Zab. 582.

If these views be correct, the appellant acquired no title by his purchase valid as against the State. As the title of the latter does not depend upon the inquisition, the alleged errors and irregularities in the proceedings of the escheator are not of the slightest consequence. The rights of the State are not affected by them. The appellant can derive no advantage from them.

The decree of the Circuit Court of the city of Richmond entered on the 17th day of June, 1869, enjoining the sale of the lots in controversy, was therefore manifestly erroneous upon its face. It was erroneous, not only for the reasons stated, but for the further reason, that it was rendered without an answer to the escheator. The provisions of the 8th section are positive, that the escheator shall file an answer stating the objection to the claim; and the cause shall be heard without any unnecessary delay, upon the petition, answer, and the evidence. It was the duty of the court to require such an answer before adjudicating the rights of the State. The decree of the Circuit Court was a decree by default; and the bill of review subsequently filed by the escheator may be treated as a petition for a rehearing. Such an application is required in all cases of decrees by default before an appeal is taken. But even if it be treated as a bill of review, it was a proper case for such a bill for the reasons already stated.

The decree of the 16th June, 1874, is, however, erroneous in one respect. If the appellant was a purchaser in good faith, he had the right to be substituted to all the rights and remedies of the creditor whose debt was paid by the proceeds of sale of the lots in controversy. This was the course pursued by this court in the case of *Hudgin v. Hudgin's Ex'or*, 6 Gratt. 320, already referred to. This court, having decided in that case that the devisees were not bound by the decree for the sale of their lands in their absence, was of opinion that the purchaser having bought in good faith, and the claim of the creditor being a just one, the former was entitled, upon a disaffirmance of the sale, to be substituted to the rights of

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the creditor, and to charge the land with the amount of the debt paid by him.

This, of course, involves an inquiry into the validity of the claim asserted by William Gleason, as assignee of John W. Thompson. It may be, as is alleged, that this claim was utterly fraudulent. This record does not furnish any reliable or satisfactory information on that subject. This court cannot undertake to affirm positively that it is a fictitious claim. If such be its character, neither the State nor the lands of which Haunstein died possessed can be made chargeable with it. It will devolve upon the appellant to show that the debt is a just one; and that must be done by evidence other than the judgment in question. This evidence he may be able to furnish. At all events, he should have an opportunity of doing so, if desired by him. The decree is therefore, affirmed dissolving the injunction, but the same to be retained in the Circuit Court for the inquiry, if desired by the appellant.

Decree amended and affirmed.

MILLER V. FLETCHER.

(27 Gratt. 403.)

Deed — delivery in escrow — conditional delivery — evidence.

When a deed, perfect upon its face, is delivered to the grantee or obligee as an escrow, upon a condition that it shall be a valid deed upon its execution by another person, it is valid and operative though the condition is not complied with, and parol evidence of the condition is not admissible.

ACTION of debt against Miller and others upon a bond of \$2,409, dated Sept. 4th, 1861 and payable on demand. The bond was perfect on its face. The opinion states the necessary facts.

B. F. Miller, one of the defendants, filed a special plea, that the writing declared on was made and delivered as an escrow to the plaintiff, on the express condition, and none other, that John Miller and Eastham Jordan should sign and seal it as their own act and deed, and should become bound equally and jointly with the said James F. Brown and B. F. Miller; and if the said John Miller and Eastham Jordan should refuse, or fail to sign, seal and deliver the said writing as joint co-obligors of the said James F. Brown and B. F. Miller, the same was not to bind the said B. F. Miller, but was to be held null, etc.; and he avers

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that said Eastham Jordan did not sign, seal and deliver the said writing; and so, etc.

The plaintiff demurred to the plea; but the court overruled the demurrer.

Upon the trial of the cause, the defendant, B. F. Miller, was introduced as a witness, and his counsel proposed to prove by him that a firm, under the style of Brown, Miller & Co., composed of the three defendants and Eastham Jordan, who were dealers in cattle, on the 4th of September, 1861, owed the plaintiff the sum of \$2,409.51 on a transaction between them, for which the plaintiff held their written contract not under seal, and that he desired to change the form of the evidence of the debt, and applied to B. F. Miller to execute the bond sued on: and that B. F. Miller executed the bond upon condition that all the other members of the firm should execute said bond. But the court excluded all evidence of the facts proposed to be proved, save as to the conditions upon which the bond was executed: and the defendant excepted.

The plaintiff was then sworn in his own behalf, and on his cross-examination the defendant proposed to prove by him the facts stated in the foregoing exception, as to the original debt. But the court excluded the evidence; and the defendant again excepted.

The jury found in favor of the plaintiff for \$2,409, with interest from the 4th September, 1861, subject to the credits indorsed upon the bond; and the court rendered a judgment according to the verdict. Whereupon B. F. Miller applied to a judge of this court for a *superse-deas*; which was awarded.

W. W. Gordon, for appellant.

Brooke & Scott, J. C. Gibson and Menifee, for appellee.

STAPLES, J. This is an action founded upon a bond or single bill for the payment of money. The defendants plead that it was executed by them in satisfaction of a debt due the plaintiff by the firm of Brown, Miller & Co., and delivered to the plaintiff as an escrow, upon condition it was to be likewise executed by two other members of said firm; but that in fact it had been executed only by one of them; and so the condition upon which the writing was to take effect had not been performed. The question raised by this plea, and which we are called upon to decide is, whether where a deed, perfect on its face, is delivered by the obligor or grantor directly to the obligee or grantee, it is competent to prove by parol evidence the delivery was upon a condition which has not been

complied with, and thereby render the instrument inoperative as to the parties executing it.

In Sheppard's Touchstone, vol. 1, pp. 58, 59, the rule is thus laid down: "The delivery of a deed as an escrow is said to be, where one doth make and seal a deed and deliver it unto a *stranger*, unt.. certain conditions be performed, and then to be delivered to him, to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such delivery is good. But in this case two cautions must be heeded: 1. That the form of words in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself, to whom it is made." After discussing the first ground of caution at some length, the learned author proceeds as follows: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself, to whom it is made, upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently; and the party is not bound to perform the condition; for in *traditionibus chartarum, non quod dictum, sed quod factum est inspicitur*." Another reason assigned for this rule of the common law by Lord COKE is, "the delivery is sufficient without speaking of any words, and then when the words are contrary to the act, which is the delivery, the words are of none effect."

The doctrine here laid down by these learned writers has been sometimes spoken of by judges as extremely technical and unsatisfactory. It may be so; but after a very careful examination I have not been able to find any well-considered case in which that doctrine has been directly overruled.

In *Hicks v. Goode*, 12 Leigh, 479, 490, Judge CABELL, in delivering the opinion of the court, conceded the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger, and he was not disposed to controvert it. He said, "The reasoning on which the distinction is founded was not only technical but unsatisfactory to his mind. He considered it as settled, however, that if a deed be delivered to the party himself, to whom it is made as an escrow, but to become the deed of him who sealed it on certain conditions; in such case, whatever be the form of the words, the delivery is absolute, and the party is not bound to perform the conditions."

The counsel who argued that case, on both sides, admitted that such is the law; too well settled for controversy. It was insisted, however, on behalf of the defendant, that the rule applied only to a deed perfect and complete on its face, requiring nothing to be done to give it full

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efficacy as a deed, according to the intention, but the mere delivery. But where the instrument at the time it passed into the hands of the grantee or obligee is incomplete, and indicates clearly on its face that some other act is to be done to give it effect, according to the intention of all the parties, there it was insisted the rule did not apply, and it was competent to show by parol that the delivery was upon a condition which had not been performed. And so this court held; and it will be seen upon examination that the decision was placed upon that ground exclusively.

In *Ward v. Churn*, 18 Gratt. 801, Judge JOYNES adverted to this rule of the common law: "He said it was strict and technical to the last degree; and yet he did not venture to deny that the doctrine is well settled." In the course of his opinion he cites with approbation some observations of Chief Justice BEST in the case of *Hudson v. Revett*, 15 Eng. C. L. R. 467, wherein the learned chief justice quotes Comyn, vol. 4, p. 276, 4 A., FART as saying: "If the deed be delivered to *the party* as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition be performed, though the party happens to have it before the condition is performed."

Now it is most remarkable, be it said with all humility, that two judges, so distinguished for accuracy and learning, should have fallen into such an error. What Comyn does say is this: "So if it (the deed) be delivered to a stranger as an escrow, to be his deed upon performance of conditions, it is not his deed till the conditions are performed, though the party happens to have it before. 2 Rol. 25, 125, 45; Coke Litt. 36 a. "Or be delivered to a stranger to keep till conditions be performed, 2 Rol. 25, 1, 40. "Or *to be* delivered to the party as his deed upon performance of a condition."

Now this is relied upon by Chief Justice BEST as authority for the position, that a deed may be delivered to the party upon condition, and it is good. But it will be perceived that Comyn means simply to affirm, that if the deed be delivered to *a stranger*, "*to be* delivered to the party as his deed upon performance of a condition, it is not his deed till the conditions be performed, though the party happens to have it before." That such was his meaning is manifest from the very next sentence, not noticed by the learned chief justice, in which he declares: "But a delivery cannot be to the obligee as an escrow." 2 Cro. 85, 86.

And in division A 3, p. 274, Comyn again declares, that "if an obligation be made to A, and delivered to A himself as an escrow, to be his deed upon performance of a condition, this is an absolute delivery and the subsequent words are void and repugnant."

A more remarkable instance of an entire misconception of an author's meaning has rarely been exhibited by a learned judge. It is worthy of observation, that Chief Justice BEST himself does not assert the rule laid down by Sheppard is not sound law; he merely declares it a technical subtlety. The case of *Hudson v. Revett* was decided upon the ground that the deed was incomplete when it passed into the hands of the grantee; and the observations of the chief justice were wholly unnecessary to the decision.

There is one other case decided by an English court, sometimes relied on as opposing the doctrine of the text in Sheppard and the other common-law writers. I mean the case of *Johnson et al. v. Baker*, 4 Barn. & Ald. 440, in which it was held it might be shown by parol that a composition deed was delivered as an escrow, upon condition it should be void unless executed by certain other creditors, which was not done. It will be seen, however, that the instrument was a deed of composition, whereby payments were to be made to all the creditors, each of whom was to release his claim, and if any should refuse, the entire purpose of the deed was defeated. Nor does it appear that the creditor, to whom the delivery was made, was then a party to the deed, and he was, therefore, in no condition to insist upon the estoppel.

With the exception of these cases, which, indeed, do not expressly controvert the principle, the English authorities, so far as I have seen, are uniform in their adherence to the doctrine for which I am contending.

In the United States the cases speak almost with one voice. This is the more remarkable, because, in a large majority of the States, a strong disposition has been constantly manifested, either by judicial decision or by legislation, to rid the courts of those rules of the common law which are regarded as purely technical. The rule in question has, however, been adhered to with an unanimity almost without parallel. It is impossible, with any just regard to the proper limits of an opinion, to quote from the numerous authorities upon this subject. It may not be improper, in a question of so much importance, never yet settled in this State, to cite the opinions of distinguished judges in some few of the cases decided in the different States, and also the opinions of learned commentators who have written upon the subject.

The first case is that of *Simonton's estate*, 4 Watts, 180, Pennsylvania. KENEDY, J. "An agreement to deliver a deed as an escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If delivered under such an agreement, it will be deemed an absolute delivery, and a consummation of the execution of the deed. To construe such agreements otherwise,

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would not only be putting it in the power of the party, in whose favor the deed is made, to practice a fraud upon the community by means of it, in obtaining a credit that otherwise would not be given to him, but would be opening a wide door for the introduction of frauds and perjuries."

Duncan et al. v. Pope, 47 Ga. 445. MONTGOMERY, J. "An escrow, *ex vi termini*, is a deed delivered to some third person, to be by him delivered to the grantee upon performance of some precedent condition by the grantee or another, or the happening of some event. If delivered to the grantee or his agent, the delivery is complete and the paper is not an escrow. It follows that the delivery of the deed to the attorneys of the bastard, carried the complete title in the property granted to the grantee, divested of all parol conditions."

Cin., Wil. and Zanesville R. R. Co. v. Iliff, 13 Ohio St. 235. BRINKERHOFF, J. "There can be no doubt, according to the uniform current of authority, that if in this case the instrument of release had been, as a completed instrument, delivered to Carrol, simply as the agent of the company to procure the right of way, although the delivery may have been accompanied by verbal stipulations that the instrument should not *operate* as a release until and unless certain conditions were first performed, the release would have been operative according to its terms, and the verbal stipulations, in respect to its operation after delivery, would have amounted to nothing."

Ward v. Lewis, 4 Pick. 518. MORTON, J. "We are, therefore, satisfied that the deed of indenture was delivered by the debtors to the assignees and to the creditors. It could not have been delivered as an escrow, because it was delivered to the parties; an escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. Upon delivery it became an absolute deed, and went into immediate operation as to all who had executed it. If it had been the intention of the parties to make a conditional assignment, to take effect only upon the signature of the whole, or a major part of the creditors, that condition ought to have been inserted in the instrument itself. But to permit parties to a deed, purporting to be absolute, to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief."

Currie v. Donald, 2 Wash. (Va.) 59. LYONS, J. "The second objection is to the proof respecting the delivery. The parties have declared it to be sealed and delivered, and this is attested by the signature

of four witnesses, who could not afterward have been permitted to disprove it. This delivery we must consider as absolute, because if it had been intended as an *escrow* it ought to have been so stated."

2 Lomax's Dig. 38. "Secondly, that the delivery of the deed as an escrow be to a stranger; for if a person delivers a deed to the party himself, to whom it is made as an escrow upon certain conditions, the delivery is absolute, and the deed will take effect immediately; nor will the party to whom it is delivered be bound to perform the conditions."

In 8 Washburn on Real Prop. 268, the doctrine is thus laid down: "If the delivery is made to the party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently as the deed of the grantor, discharged of the conditions upon which the delivery was made."

To these authorities may be added the cases of *Brackett v. Barney*, 28 N. Y. 333; *Worrall v. Munn*, 1 Seld. 238; *Jackson v. Catlin*, 2 Johns. 259, decided by the Supreme Court of New York. The case of *Black v. Shreve*, 13 N. J. Eq. 456; the case of *Herdman v. Bratten*, 2 Harr. (Del.) 896; the case of *Cin., Wil. & Zanesville R. R. Co. v. Iliff*, 13 Ohio St. 235; the case of *Mad. & Ind. Plank R. Co. v. Stevens*, 10 Ind. 1; the case of *Brown v. Reynolds*, 5 Sneed (Tenn.), 639; *Gibson v. Partee*, 2 Dev. & Battle (N. C.), 530; *Hagood v. Harley*, 8 Rich. Law. 325; *Graves v. Tucker*, 10 S. & M. (Miss.) 9; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 161; and the case of *Moss v. Riddle*, decided by the Supreme Court of the United States.

A doctrine sustained by such an array of authorities, a doctrine which has survived all the changes and innovations of modern reform, must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation. The chief argument against it is, that it recognizes distinctions technical and unsatisfactory in the extreme.

It is said, for example, a deed may be delivered as an escrow to a stranger, or even to a co-obligator, to be delivered by them to the obligee; and there can be no good reason why it should not be delivered directly to the obligee as an escrow. It would be easy to show that this distinction is not so technical and unsatisfactory as is imagined. But it does not concern me to vindicate that distinction. I am dealing only with the particular rule of the common law invoked in this case. The question is, whether this court can safely depart from it here. Whether it can overturn that which is so well established elsewhere, and so fully sustained by the concurring voices of able commentators and great judges.

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It may be that the rule will sometimes lead to fraud and to grievous injustice ; but what rule can be laid down that will not occasionally be perverted to purposes of mischief. The statutes of "frauds and perjuries" were designed for the prevention of notorious evils ; and yet constant experience attests that they are often but a cover for the perpetration of the grossest frauds.

In *Towner v. Lucas' Ex'r*, 13 Gratt. 705, the obligee induced one of the obligors to execute the bond as surety by the most solemn assurances that it was a mere matter of form, that the surety would never be required to pay any part of the debt, and that he, the obligee, would give him a written indemnity against any liability or damage.

This agreement was proved by the clearest evidence, and was found by the verdict of a jury upon an issue directed by the Circuit Court. This court held it was not competent to prove such an agreement by parol. Judge ALLEN, in a very able opinion which has received the almost universal approbation of the profession, relied upon the common-law maxim, that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be contradicted by averment of parties, to be proved by the uncertain testimony of "slippery memory." He said, "it is reasoning in a circle to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of the bond, promised not to enforce it. Such a principle would nullify the rule. The true question is, was there any such agreement. And this can only be established by legitimate testimony. For reasons founded in wisdom, and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement ; and as it cannot be proved by legal evidence, the agreement itself, in legal contemplation, cannot be regarded as existing in fact. Neither a court of law or of equity can act upon the hypothesis of fraud where there is no legal proof of it."

Most of the observations here made apply with peculiar force to the question under discussion.

It is easy to see that the most solemn obligations given for the payment of money are of but little value as securities, if they may, at any future day, be defeated by parol proof of conditions annexed to the delivery of the instrument, and never performed. This case before us is in point. The bond in controversy was given in 1861, for a debt antecedently due, for which all the defendants are confessedly bound independently of the obligation. The plaintiff, being no doubt well satisfied with his security, did not sue till 1871. On the trial he is met with

the defense, that the defendants executed the bond with the understanding that another person alleged to be jointly bound with them for the debt should also execute the bond; and that it was delivered to the plaintiff upon that condition. The plaintiff and one of the defendants were the only witnesses examined; each giving his version of the transaction. The jury, it seems, believed the plaintiff; but they might have believed the defendant with equal propriety. If we reverse the judgment of the court below upon the ground of the rejection of proper testimony, it is not improbable that upon a new trial a verdict may be found for the defendants. And it may be that such a verdict would be correct. The result would be in effect, however, that this most solemn deed of the parties is of no more value than the most informal parol promise to pay. It thoroughly exemplifies the observation in the case of *Williams v. Green*, Cro. Eliz. 884, that if such testimony is allowed, "a bare averment without any writing would make void every deed."

A doctrine of this sort is perhaps still more mischievous as applied to deeds of conveyance—for the title of the grantee is liable at any time to be defeated by evidence establishing parol conditions accompanying the delivery of the deed. No safeguard can be provided against perjury, or the mistakes of "slippery memory" in such cases. If parties desire to make the delivery of deeds conditional, it is easy to make such delivery to a stranger, or to insert in the instrument the terms of the contract.

For these reasons I am for adhering to the rule of the common law. In doing so, I do not mean to affirm that this rule will apply to every species of contracts in writing. There are cases in which it has been held, that you may show the agreement was signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else was done. *Pym v. Campbell*, 88 Eng. C. L. R. 370, is one of these. But these cases, whether rightly decided or not, have no application to deeds; as to which delivery is the essence and constitutes the estoppel.

I am, therefore, for affirming the judgment of the Circuit Court: first, because that court ought to have sustained the demurrer to the plea; and, second, because the evidence offered by defendants and excluded was rightly excluded upon the grounds already stated. The judgment, being right, although upon a false issue, must of course be sustained.

ANDERSON, J., was not fully prepared to concur in the doctrine, that a delivery to a grantee in a deed on condition is absolute and free from the conditions; but he would not dissent.

Judgment affirmed.

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(27 Gratt. 1025.)

Criminal law — perjury — evidence — defendant's statements.

Upon the trial of an indictment S. testified to certain facts. Afterward he stated that he had sworn falsely and, upon a re-examination, testified to directly contradictory facts. Upon an indictment for perjury, *held*, that his own statements were not sufficient to convict him of perjury.

INDICTMENT for perjury. On the trial the jury found the prisoner guilty, and assessed his fine at one dollar, and the court sentenced him to imprisonment in the jail of the city for one year. There were a number of exceptions taken by the prisoner to rulings of the court; but this court only considered the question on the motion for a new trial on the ground that the verdict was not sustained by the evidence. The facts are set out in the opinion of Judge STAPLES. On the application of the prisoner this court awarded him a writ of error.

G. Wise, for prisoner

The Attorney-General, for the Commonwealth.

STAPLES, J. The prisoner was indicted for perjury in the hustings court in the city of Manchester, and was convicted and sentenced to confinement in the jail of the city for one year. After the verdict was rendered, he moved the court to grant him a new trial, upon the ground that the verdict of the jury was contrary to the law and the evidence. His motion was overruled, and the prisoner excepted. His bill of exceptions contains all the facts proved on the trial, from which it appears that the prisoner was examined as a witness upon the trial of Joseph Turner, before the mayor of Manchester, upon the charge of rape, and upon the examination the prisoner testified that he had no conversation or plot with the said Joseph Turner, before they left Manchester, to commit a rape upon Pallas Boyd; that he and Turner went to the locality of the alleged offense for the purpose of getting flowers, and that he heard no screams from the girl, Pallas Boyd, whilst Turner had her in the bushes; that the Commonwealth's attorney asked that his testimony be written down; that a pause in his examination of two or three minutes ensued, during which time the prisoner was retired from the witness stand; that the prisoner

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during this interruption stated to Mr. Fitzgerald, a police officer, to Mr. Redford, a bystander, and to the Commonwealth's attorney, that he had sworn falsely in his testimony just given; that he had done so to screen Turner, and that when he went back on the stand he would tell the truth; that the prisoner was then put on the stand again as a witness, no other witness intervening, and testified that he and Turner had had a bargain and conversation about the girl before they left Manchester, and that he did hear screams from the girl while Turner had her in the bushes; and thereupon the said mayor refused to hear him further. It was further proved that the prisoner was not warned by said mayor that he had a right to refuse to answer questions put to him; that he had no counsel; that he appeared somewhat confused, but not more so than is usual with witnesses; and that he is in the fifteenth year of his age. And these were all the facts proved on the trial.

The charge in the indictment is of perjury in the first statement before the mayor; and the evidence relied on to establish the perjury is the contradictory statement before the same officer at a subsequent period of the same examination. As will be seen from the bill of exception, this contradictory statement was the sole and only proof adduced by the Commonwealth in support of the indictment.

The question we are to determine is, was he properly convicted upon that evidence?

No rule is perhaps better settled than that to authorize a conviction of perjury there must be two witnesses testifying to the falsity of the statement, or one witness with strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the party and the legal presumption of his innocence. This rule is founded upon the idea that it is unsafe to convict in any case where the oath of one man merely is to be weighed against that of another. Lord TENTERDEN is reported to have said that corroborating circumstances are not sufficient, but that the contradiction must be given by two witnesses. But the rule is now settled otherwise; the confirmatory evidence, however, must be of a strong character, and not merely corroborative in slight particulars.

It was at one time held that when the same person has by opposite oaths asserted and denied the same fact, he may be convicted on either; for whichever of them is given in evidence to disprove the other, the defendant cannot be heard to deny the truth of that evidence, inasmuch as it came from him. But this doctrine has been long since exploded, and it is now held that the prosecuting attorney must elect which of the two oaths he means to rely upon as false, and he must prove the perjury in that particular statement. Two early English cases are sometimes cited

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as holding that the perjury may be established by proof of the contradictory oath merely, without other evidence. One of these is an anonymous case decided by YATES, J., at the Lancaster assizes in 1764, and the ruling approved by Lord MANSFIELD. The other is the case of *Ree v. Knill*, a short report of which is found in a note in 5 Barn. & Ald., page 929. It is shown, however, in 2 Russell on Crimes, 652, that in each of these cases there were corroborating circumstances in addition to the contradictory oath. But if these cases even go to the extent which is claimed for them, they are overruled by the later English decisions. And it is now held by those courts that the defendant's own evidence upon oath is not sufficient of itself to disprove the evidence on which the perjury is assigned.

In *Regina v. Wheatland*, 8 Carr. & P. 238, Mr. Baron GURNEY held that it was not sufficient to prove that the defendant had on two different occasions given directly contradictory evidence, although he might have willfully done so ; but that the jury must be satisfied affirmatively, that what he swore at the trial was false, and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn contrary at another time ; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate as proved that the evidence given by the defendant at the trial was false.

In *Regina v. Hughes*, 1 Carr. & Ker. 519, TINDAL, C. J., said : If you merely prove the two contradictory statements on oath, and leave it there, *non constat*, which statement is the true one ? See, also, *Mary Jackson's case*, 1 Lewin, 270 ; 2 Russell on Crimes, 651-652 ; Roscoe's *Crim. Ev.* 765-768.

In the United States there are but few decisions bearing upon the question. The writers on criminal law, however, lay down the rule in conformity with the English cases. 3 Whart., § 2275 ; 2 Bish. *Crim. Law*, § 1005 ; 1 Greenleaf's *Ev.* 259.

The only opposing case is that of *The People v. Burden*, 9 Barb. 467. There JOHNSON, J., delivering the opinion of the court, enters into an elaborate discussion of the whole subject, and arrives at the following conclusions : That where a defendant by a subsequent deposition expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that such former one was intentionally false at the time it was made, he may be properly arrested upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions." To maintain his position, the learned judge relies upon the two English cases

already mentioned, not adverting, however, to the fact that there were corroborating circumstances in each of them. The distinction he seeks to establish is not recognized by any adjudicated case, or by any writer on criminal law. This proposition is, that the first oath of the prisoner must be held to be false because in the second he admitted it to be so. In other words, when the prisoner has made two contradictory statements under oath, and in the second he has acknowledged the intentional falsity of the first, that acknowledgment is sufficient to establish the perjury of the first without further evidence. And it is asked why may not the prisoner be convicted of perjury upon his mere confession, as in other cases.

It is not denied that a full judicial confession is perhaps sufficient to found a conviction upon in any case. It is substantially the same as a plea of guilty to the indictment. But it is denied that a mere admission not judicial, of having sworn falsely, dispenses with all further proof of the fact. As before stated, when there are two conflicting statements under oath the prisoner cannot be convicted upon either, for the reason, say the judges, it is not possible to tell which is the true and which is the false. In such case, it is agreed on all hands, that strong confirmatory evidence is essential. It is gravely insisted that this confirmatory evidence is fully supplied by the prisoner's acknowledgment of the falsity of the first statement. Why may not the acknowledgment itself be false.

If the second oath, deliberately taken, is insufficient to overcome the first, why should a mere admission have that effect? When a witness deliberately asserts a fact to be true as within his knowledge, and in a few minutes thereafter deliberately and intentionally asserts the very reverse as within his knowledge, all ground of innocent mistake being excluded, he thereby indirectly but unequivocally affirms the falsity of the first. Do we discredit the first any sooner, or believe the second the more readily, because the witness tells us that one was intentionally false and the other true? We believe neither of them. We place no confidence in either statement, from an absolute inability to determine which is true, or whether either is true. If the witness is afterward put on his trial for perjury, our difficulties are in nowise removed. We are still in doubt which is the true and which is the false. It is very true that a witness making two palpably conflicting statements may sometimes by his demeanor satisfy the hearer that one is to be credited rather than the other. But when those statements are repeated to a third person, it is very difficult, if not impossible, to detect the false without some aid from surrounding circumstances. And no mere asseveration of the

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witness will assist the mind in arriving at a just and accurate conclusion. If the witness is to be convicted of perjury upon his bare declaration that the first statement is false, it is not because we believe his declaration is necessarily true, but upon some idea that it is in the nature of a confession, and, therefore, to be believed. A deliberate confession of guilt is generally credited, because it is presumed to flow from the highest sense of guilt? It must be remembered, however, that there are two statements upon oath, and if the prisoner is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and the prosecutor might select either as the ground of his proceeding. In this very case the Commonwealth might have elected to proceed upon the second statement made by the prisoner. In that event all will concede he must have produced other testimony in addition to the contradictory statement first made. Is it possible that the principle is so reversed and is of so little value that the prisoner may be convicted of perjury upon the first, merely because upon his second examination he admitted the first did not contain the truth.

If this be so, the rule laid down that in case of two conflicting statements there can be no conviction unless there is corroborative evidence is not of the slightest value. When we speak of corroborative evidence, we do not mean such as emanates from the mouth of the prisoner himself, but evidence *aliunde*, evidence which tends to show the perjury independently of his own declarations. The whole law in reference to perjury is based upon the idea that when there is witness against witness, oath against oath, there must be other evidence to satisfy the mind.

The rule is thus laid down in 1 Greenleaf, § 265: "If the evidence in proof of the crime of perjury consists of two opposing statements of the prisoner, and nothing more, he cannot be convicted. * * * If both the contradictory statements were delivered under oath there is nothing to show which of them is false, where no evidence of the falsity is given." See, also, *Dodge v. State*, 4 Zab. 455. This is a sound rule, and ought not to be departed from to meet particular cases. In this connection it may be mentioned that the decision in the New York case was made by two judges in a court of three—Judge SELDEN dissenting.

The case now in hand is a strong illustration of the value of the rule in question. The prisoner was a youth of fifteen, charged before the same magistrate with being implicated in the crime of rape, and acquitted but a few minutes before. Upon his examination he was without counsel or advice, and was not cautioned that he was not bound to criminate

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himself. His examination had not been completed, but merely suspended ; and during this interval he is said to have made to officers of the government the statements upon which his conviction is founded. Before he had concluded he was stopped by the mayor, in the midst of his narrative, and forbade to say more. What he would have further said we cannot even conjecture. So great is the abhorrence of the crime of rape, that the passions and suspicions of men are more easily excited than by any other accusation. When, therefore, the prisoner confessed his complicity in the crime, ready credence was given to the statement. If in his first statement he had made the same confession, and in his subsequent examination denied it, it is easy to see that the perjury would have been charged in the last and not in the first. And yet without the aid of other evidence the one statement was entitled to no greater consideration than the other. Upon the whole, I think the prisoner was improperly convicted upon the facts as presented to the jury.

With respect to the instructions, my opinion is, that no error was committed by the court either in refusing those asked for, or in giving those that were given. Upon the points presented by the second bill of exceptions, it is unnecessary to express any opinion, as the question will probably not again arise.

Judgment reversed.

CASES
IN THE
S U P R E M E C O U R T
OF
MISSOURI.

Doss v. MISSOURI, KANSAS & TEXAS RAILROAD COMPANY,
appellant.

(59 Mo. 27.)

Negligence — right of one not a passenger on a railway train. Damages.

Plaintiff went on board defendant's railroad train, not as a passenger, but to find seats for a lady and child whom he had in charge. After finding the seats he attempted to get off the train and in so doing was injured. *Held*, that even though he got off after the train was in motion, yet if sufficient notice of the start and a reasonable time to get off were not given, the company was liable.

A railroad company is not liable to exemplary or punitive damages for injuries occasioned through the act of its agents unless such acts are wanton or malicious.

ACTION to recover damages for an injury sustained by plaintiff in stepping down from one of defendant's cars to the platform connected with the station-house.

The petition states that defendant, as a common carrier, was bound to provide suitable means of ingress and egress in and from their cars, and suitable platforms, from which passengers could pass into said cars, and more especially into the car provided for female passengers; and that it was their duty to stop said car, so set apart for female passengers, at such platform so that female passengers could pass into and out of said car with safety.

The petition then alleges that on the 10th of May, 1872, the plaintiff was attending his sister-in-law, with her infant child, to the depot at Nevada, with a view to place them in the ladies' car; that the train stopped in the night-time, and the employees of defendant grossly neglected to

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stop the ladies' car of said train, at said platform, as they were in duty bound to do, but allowed said car to be stopped at a place distant from said platform. And in consequence of said negligence it became necessary for the lady and her child, who were under plaintiff's charge, to pass through a number of other cars of said train, which were dark and unlighted, so that by the time the plaintiff, with the lady and child, reached the door of the ladies' car, the train started, without giving any signal, and persons on the train desiring to leave could not do so with safety.

It is averred that any female passenger has a right to be conducted into the car, where she is to be conveyed, and, therefore, plaintiff, having been requested in this instance by the female passenger to escort her, had a right to be in said car at the time aforesaid, and a right to be duly notified by signal or otherwise of the time of starting said train, so that he could pass therefrom with safety.

Nevertheless, it is further averred, the agents of defendant, with gross negligence, started the train without giving any such signal or other notice, and the plaintiff, without any negligence on his part, in attempting, at the time the train started, to pass from it to the platform, was, in consequence of the sudden and rapid motion of the cars, thrown suddenly and violently against and upon said platform, and received great bodily harm, etc.

The answer denies all the material allegations of the petition. The testimony was to the effect, that the plaintiff, who lived at Nevada, which was near a station on the defendant's road, accompanied his sister-in-law to the station, with a view to see her and her child safely on the cars, on the night of the 15th of May, 1872; that the train was behind time by half an hour or more; that on its arrival, the plaintiff, who was on the platform with the lady under his charge, discovered that the ladies' car did not get within ten feet of the platform, and therefore conducted the lady and child to an opening which led to the car immediately behind the baggage or express car, and passed through that car, and perhaps another, until he reached the car next to the sleeping car; that as soon as the lady was seated, he turned back, and, without having observed that the train was in motion, attempted to get out on the platform, and was thrown or fell upon it and injured.

The evidence in regard to the length of time the train stopped, and as to any signal being given before starting, either by the usual proclamation from the conductor of "all aboard," or by ringing of the bell, was conflicting. The time the train was stopped was, according to all the witnesses, however, between two and five minutes, and the conductor stated, that after his cry of "all aboard," he waved his lantern to the engineer as a

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signal to move. The customary delay at that station of the express train was, according to the statements of the officers, about two and a half minutes.

The court, at the request of plaintiff, instructed the jury as follows :

1. "The court instructs the jury on the part of plaintiff, that it was the duty of the railroad company, as a common carrier of passengers, by its agents and employees, to have so stopped the passenger cars at the platform at the depot, as to have made it safe for ingress and egress of passengers into and from the same; and also to stop the cars for a sufficient length of time to get on and off the cars with safety, and before starting to have given a signal of starting, for such reasonable length of time as to have enabled passengers to get on with safety, and persons to get off with safety, and if the jury believe from the evidence that the plaintiff, as the conductor of his sister-in-law and her infant child who were taking passage on said cars, put said sister and child as soon as he could, after the train stopped, on the cars, and immediately left and attempted to pass from the cars to the platform, and that the cars were started without giving reasonable length of time to get off, and without giving the usual signal of starting, and that, in consequence of such negligence on the part of the employees of the company, the plaintiff was injured in getting from said cars, the jury will find a verdict for the plaintiff, and assess the damages at such amount as they may believe from the evidence that the plaintiff has sustained, not to exceed \$10,000."

2. "The court instructs the jury, on the part of the plaintiff, that if they find for the plaintiff, they are not confined to the actual damages sustained by the plaintiff, but may take into consideration all the circumstances and facts detailed in evidence, and may give exemplary or punitive damages in such reasonable amount, above the actual damages sustained, as they believe the evidence warrants."

3. "If plaintiff used due diligence in getting from the car, and if the train was prematurely started, without due and reasonable notice of such starting, and if the plaintiff was not conscious of the starting of such train when he attempted to step from the cars to the platform, then plaintiff is not the less entitled to recover on account of the time and manner of his stepping from the car."

The court refused the following instructions asked by defendant. 1. "If the jury believe, from the evidence, that plaintiff was not a passenger on defendant's cars, it was not necessary for him to be notified of the time of the departure of the cars." 2. "That the defendant is not bound to use the same degree of care in regard to the plaintiff, a stranger who voluntarily went upon its cars for the purpose of seeing his sister safely started,

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that it is to passengers." 3. "That if the jury believe, from the evidence, that the plaintiff voluntarily went upon defendant's cars, without the intention of becoming a passenger, and voluntarily left defendant's cars, and was injured while voluntarily leaving said cars, while they were in motion, he cannot recover." 4. "That if the jury believe, from the evidence, that the plaintiff was not a passenger on defendant's cars at the time of the alleged injury, then it devolves upon him to prove that he was on said cars by authority of some person connected therewith, or that it became necessary for him to go upon defendant's cars at that time, before he can recover. And the mere fact that he went upon the cars for the purpose of seeing his sister seated, without proving the necessity of so doing, and was injured in leaving the cars while they were in motion, will not entitle him to recover."

To the action of the court in refusing those instructions, the defendant duly excepted.

The court, of its own motion, gave the following instructions: "That if the jury believe, from the evidence, that plaintiff was not a passenger on defendant's cars at the time of the alleged injury, it devolves on plaintiff to prove that he was on the cars, by authority of some person connected therewith, or that it became necessary for him to go upon said cars, and plaintiff cannot recover, unless they should believe, from the evidence, that it was necessary for him to go on the cars to seat his sister-in-law and child, and the jury are to consider all the circumstances of the case as to whether it was necessary or not for plaintiff to go on the cars."

The defendant duly objected and excepted to the giving of all the above instructions.

The verdict was for plaintiff and the damages assessed at \$1,600. Motions for new trial and in arrest were made, which were overruled, and the case is brought here by appeal.

Philips & Vest, for appellant.

Waldo P. Johnson, for respondent.

NAPTON, J. [After stating the foregoing facts.] The decision of this case depends entirely on the propriety of the instructions given to the jury, and it is obvious that the judgment must be reversed on account of the second instruction given for the plaintiff, on the subject of punitive or vindictive damages. We have decided that such damages may be warranted against a corporation as well as against an individual, where the

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circumstances of the case authorize them. *Perkins v. M., K. & T. R. R. Co.*, 55 Mo. 214. Therefore, where the agents of a corporation act wantonly or maliciously, the corporation may be held to answer in exemplary damages. But there was no evidence in this case tending to prove any intentional wrong to plaintiff; in fact it appears affirmatively, that the conductor was not aware that the plaintiff was on the train, nor, so far as the evidence of the plaintiff himself shows, was the conduct of any of the officers or agents of the defendant, in anywise influenced by any knowledge of the plaintiff's situation or of his wish to get off the train. An instruction, therefore, on the subject of punitive damages was a mere abstraction; but perhaps not a harmless one, since the jury might well infer that the court, in giving such an instruction, was of opinion that there was some evidence in the case to justify it.

The first instruction presents questions of more difficulty, upon which there has been no uniformity of opinion in such adjudged cases as we have been able to find. It is clear that the same degree of care on the part of a railroad company exacted by the law in regard to passengers, is not required of them, in regard to persons who are not passengers. In the latter case, nothing more is required than ordinary diligence. And whether there is a want of ordinary care in a particular case depends so much on its attendant circumstances, that a definite rule becomes difficult, if not impossible. The points of negligence averred and insisted on here are: 1st. The failure of the officers to put the passenger cars in connection with the platform, so that passengers could pass into and from them directly to and from the platform; 2d. The failure to give notice, by signal or otherwise, to plaintiff of the starting of the train; 3d. The failure to stop the cars for a sufficient length of time to enable the plaintiff to get on and off the car.

It is intimated, and perhaps decided in some adjudged cases, that a person occupying the position of the plaintiff is in the position of a mere trespasser, on an implied license, and, therefore, although the law requires of railroad companies, as common carriers of passengers, great exactness and care in regulating the departure of trains, and in the giving notice to passengers of such departure, yet such care is not required in relation to persons who are not passengers, or not upon the premises at the instance or request of the company. And it was accordingly held in the case of *Lucas, adm'r, v. T. & N. B. R. R. Co.*, 5 Gray, 64, that "the rules and regulations presented by a railroad company, in relation to the departure of trains and for giving notice to passengers, do not extend to persons who are not passengers, with or without compensation, or who are on the premises without request or instance of the company, and,

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therefore, the omission to comply with such regulation is no ground of complaint by one who is not a passenger, if, under the circumstances, the company used ordinary care ; ” and further, “ that the law has not imposed upon the railroad company the duty of giving special notice of the train to leave, to persons who are not passengers, with or without compensation, or who are not there at the instance of the company ; nor of prescribing by rules a system or method for giving such notice to such persons.”

Persons entering the cars, who are not passengers, and without the request or instance of the company, are bound to know the time of departure (if such time be fixed, and reasonable public notice given thereof), and to leave the cars in such season before the time so fixed, as would enable them to get off with care, before the cars are set in motion. With the arrival of the time fixed for the departure of the cars, the implied license or permission ceased, and with it the liability of the defendant, except in case of misfeasance or gross negligence.” This was said in a case where a lady had conducted and assisted into the cars, her aunt who was aged and infirm, and affected by disease of the heart and unable to enter the cars without assistance, and upon leaving and attempting to step on the platform after the cars had commenced moving, was precipitated under the wheels, and her arm and leg severed from her body. The court held she had no cause of action, upon the ground that she was on the cars merely by license or permission, and because in such case she attempted to leave the cars after they were put in motion. Whether the usual signals for leaving had been given or not was treated as an inquiry of no importance, on the ground that the lady (plaintiff) was where she had no right to be—that was, on the steps of the car.

We should be very reluctant to hold, that an aged or infirm mother, or sister, or wife, or indeed any other woman, especially if incumbered with an infant child, should not be allowed the assistance of a male friend or relative in getting a seat upon a railroad car, and that such friend or relative was to be treated as a mere stranger to the company, having no claim upon the company for an injury under any circumstances. Not being a passenger, it is conceded that no extraordinary care was required ; but whether the neglect of customary signals would not amount to ordinary negligence is a matter upon which the Massachusetts decision is not satisfactory.

The doctrine of the Supreme Court of Pennsylvania in *Gillis v. The Pa. R. R. Co.*, 9 P. F. Smith, 129, decided in 1869, seems more consonant with justice.

In that case, a platform connected with the depot at Johnstown ex-

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tended over a canal, or a chasm once used as a canal, and on the occasion of President Johnson's arrival in the cars, a multitude of people gathered on this platform, to hear the president's speech, and the timbers which supported it gave way, and a number of persons were precipitated into the chasm, some of whom were killed and others seriously injured. The court held, however, that the company owning the road was not responsible to the persons injured, who came through curiosity and had no business with the road; but as to persons who came on the platform to meet or part with passengers, the court held the company bound to have the structure strong enough to bear all who could stand upon it. The judge observed: "Had it been the hour for the arrival or departure of a train, and he (the plaintiff) had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendant had nothing to do with that."

This seems the more reasonable doctrine and is sanctioned by the recent English cases of *Gautret, adm'r, v. Egerton*, Law Rep., 2 C. P. 371; *Holmes v. N. E. R. Co.*, Law Rep., 4 Exch. 254. And if a person who visits a railroad train to welcome a coming guest, or speed a parting one, is held to have claims on the railroad company for ordinary care, surely one who attends a female passenger, incumbered with an infant and a satchel, is entitled to hold the company to equal responsibility.

The first part of instruction number one, given for the plaintiff in regard to the duties of defendant, in relation to its passengers, though abstractly correct, was outside of the case on trial. That instruction declared that "it was the duty of the railroad company, as a common carrier of passengers by its agents and employees, to have so stopped the passenger cars at the platform of the depot, as to have made it safe for ingress and egress of passengers into and from the same."

This is true, but the plaintiff was not a passenger, and no injury happened to the lady, who was a passenger, by reason of the failure of all the passenger cars to be placed within reach of the platform. But the plaintiff was entitled to have sufficient time to escort the lady under

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his charge to her seat, and then leave the cars. If the time was not enough, or if the defendant's agents failed to give notice of the starting of the train, by the usual signals, of an oral cry of "all aboard" from the conductor, and the ringing of the bell by the engineer, it was not such ordinary care as the defendant was bound to exercise, both toward passengers and persons in the situation of plaintiff. And these questions of fact were, therefore, properly submitted to the jury by the court.

Whether the attempt of plaintiff to step from the cars when the train was in motion was, under the circumstances of the case, such negligence as would relieve the defendant of all responsibility for accident, is a question of fact for the jury, as this court held in the case of *Wyatt v. Citizens' R. R. Co.*, 55 Mo. 485; *Karle v. K. C. St. Jo. & B. R. R.*, id. 476; *Lloyd v. Hann. & St. Joe. R. R. Co.*, 53 id. 509; *Burham v. St. Louis & I. M. R. R.*, 56 id. 338. These are risks which the most prudent men will take, and the plaintiff will not be barred of a recovery for his injury, if he adopted the course which most prudent men would take under similar circumstances. For a person to jump from a car, propelled by steam, when it is in rapid motion, may be regarded as mere recklessness; but to step from a car not yet beyond the platform, and whose motion is so slight as to be almost or quite imperceptible, may not be negligence, and whether it is or not, is for the jury to decide from the physical condition of the person, and all the attendant circumstances. A young, healthy and vigorous man may assume risks which would be culpable negligence in another of feeble health or protracted age. *Shearm. and Redf.*, on Neg. ch. 30; *Foy v. Brighton R. R. Co.*, 18 C. B. (N. S.) 225; *Filer v. N. Y. Central R. R.*, 49 N. Y. 47; S. C., 10 Am. Rep. 327.

If the first instruction asked by defendant is understood to mean any special notice to plaintiff, it was correct and should have been given. It was the plaintiff's business to make himself acquainted with the usual delay of the train at Nevada, and with the usual signal for the starting of the train, and if that signal was given in time for plaintiff to have left the cars, his delay was at his own risk. It was impossible for the conductor to know that the plaintiff, in going on the cars, did not intend to go as a passenger. He was, therefore, entitled to no other notice than such as was given to passengers, to enable them to get on and off the cars.

The third and fourth instructions asked by defendant were properly refused.

The judgment is reversed and the cause remanded. The other judges concur.

Judgment reversed.

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BISSIG, appellant, v. BRITTON.

(59 Mo. 204.)

Statute of frauds — verbal promise of indemnity to a surety.

Defendant, a surety on a replevin bond, verbally promised plaintiff that if he would sign the bond as surety, the defendant would save him harmless from all damages therefrom. *Held*, that such promise was void under the statute as an agreement to answer for the default of another.

ACTION on a verbal agreement. The opinion states the case.

Murat Masterson and Fred Ledergerber, for appellant.

O. A. Mossman, for respondent.

WAGNER, J. This was an action upon a verbal promise made by the defendant, to hold the plaintiff harmless from all damages arising by reason of plaintiff signing, as surety, a replevin bond for John A. Wisner and others, they being about to commence an action for the recovery of personal property before a justice of the peace.

The petition alleged that defendant had already signed the bond as surety, and that in order to make it good he requested plaintiff to sign it also, promising at the time that he would hold plaintiff harmless from all damages arising therefrom, and from all liabilities incurred on account thereof, and that, if any money was ever required to be paid in consequence of the undertaking, he would pay it himself; that plaintiff signed the bond solely upon that consideration, promise and agreement. There was then an averment that judgment was rendered against Wisner and others, and their bondsmen, and that the property replevied was not returned, and that an execution was issued against them, which defendant refused and neglected to pay, and which plaintiff was compelled to satisfy in full.

These averments were denied in the answer, but the only defense relied on at the trial was, that the promise was within the statute of frauds, and not being evidenced by any writing was, therefore, void. This defense was sustained by the court below, and the plaintiff appealed.

The 5th section of the act in relation to frauds and perjuries declares that "No action shall be brought to charge any executor or administrator upon any special promise to answer for any debt or damage out of his own estate, or to charge any person upon any special promise to answer for the debt, default or misconduct of another person * * *

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unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." Wagn. Stat. 656.

This section of our statute is mainly a transcript of the English statute of frauds and perjuries, and it is, therefore, important to examine the English cases, and ascertain how it has been construed there in doubtful cases. There, as in this country, it was for some time involved in uncertainty as to whether contracts or promises of indemnity, as exhibited in this record, were to be regarded as coming within the provisions of the statute; but the settled rule of construction now seems to be that the statute applies.

The cases proceed upon the theory that where there is an implied liability on the part of a third person to reimburse the plaintiff, or remunerate him for the damages or loss suffered on his, such third person's, account, the promise of the defendant, in an action upon an alleged undertaking to indemnify the plaintiff, is an undertaking collateral to the implied liability of such third person, and so falls within the statute, and must be in writing and signed by the defendant, or some one by him authorized to sign the same.

The earliest case in which this question was raised was *Winckworth v. Mills*, 2 Esp. N. P. 484, decided at *nisi prius*. There one Taylor made a promissory note to the defendant, who indorsed it to another, who indorsed it to the plaintiff, and he, having lost the original note, applied to the makers, who made a difficulty about paying it; whereupon the defendant verbally promised to indemnify the plaintiff if he would endeavor to enforce payment from the maker. The action was in part to recover expenses incurred in such endeavor, and Lord KENYON ruled that as to that part which was based on the promise to indemnify, the plaintiff could not recover, because it was a promise to answer for the debt and default of another.

In *Thomas v. Cook*, 8 Barn. & Cr. 728, a different doctrine was announced. In that case the plaintiff, at the request of the defendant, executed a bond with him and another, to save harmless a third person from the claims upon an old firm in which he had been a partner, and the defendant verbally promised the plaintiff to save him harmless for executing the bond, and the court decided that the defendant's promise, being merely to indemnify, was not within the statute. BAYLEY, J., saying, that in his opinion "a promise to indemnify did not fall within either the words or the policy of the statute of frauds;" and PARKER, J., said: "This was not a promise to answer for the debt, default or mis-

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carriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond."

But in the subsequent case of *Green v. Oresswell*, 10 Ad. & El. 458, in the same court, the case of *Thomas v. Cook* was overruled. There the declaration stated that John Reay had sued Joseph Hadley by *capias*, on which Hadley had been arrested; and in consideration that the plaintiff, at the request of the defendant, would become bail for Hadley upon the *capias*, the defendant promised to indemnify him; but Hadley did not put in special bail, whereby, etc. At the trial the plaintiff had a verdict; but as the pleading showed that the promise was verbal, a rule nisi to arrest the judgment was obtained, which the court after argument made absolute. Lord DENMAN, C. J., in delivering the opinion of the court, said: "The promise in effect is, 'If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right toward you, I will do it instead of him.' If there had been no decision on the subject it would appear impossible to make a reasonable doubt that this is answering for the default of another." He then referred to *Thomas v. Cook*, and added, "But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but even in that shape, we cannot see why it may not be in the words of the statute, within the mischief of the statute it most certainly falls. A distinction was also hinted at from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred toward him, not toward the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and besides, may it not be said that the arrested debtor who obtains his freedom by being bailed, undertakes to his bail to keep them harmless by paying the debt or surrendering."

This case has ever since been considered the established law in England. In the last reported decision on the subject (*Cripps v. Hartnoll*, 2 Best & Smith, 697), the case showed that one Sarah Elliott, the daughter of the defendant, had been committed to plead to an indictment against her for a misdemeanor, and to be further dealt with according to law; and being so committed, the defendant requested the plaintiff to become bail for her, and to enter into certain recognizances for her appearance; and the defendant agreed, in consideration thereof, to indemnify the plaintiff against all liability in respect thereof, and from all costs,

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damages and expenses in respect to the same. Sarah Elliott did not appear according to the conditions of the bond, and the same became estreated; and the plaintiff was compelled to pay a certain sum in consequence thereof. On the part of the defendant it was objected that the case was within the statute of frauds, and of this opinion was the court. *Green v. Cresswell* was quoted as decisive authority, and the judgment for the defendant was made absolute.

In the American States great contrariety on the question exists. In New York and Maine in an early day, *Thomas v. Cook* was followed, and it was held that where the defendant promised to hold the plaintiff harmless against the consequences of his signing at his request a writing for the benefit of a third person, the promise was in the nature of an original undertaking and not within the statute. *Chapin v. Merrill*, 4 Wend. 657; *Smith v. Sayward*, 5 Greenl. 504. And upon the authority of the cases just cited, the rule has been announced in Georgia and Kentucky, that promises to indemnify are not within the statute of frauds. *Jones v. Shorter*, 1 Kelley, 294; *Dunn v. West*, 5 B. Monr. 382; *Lucas v. Chamberlain*, 8 id. 276; *Jones v. Letcher*, 13 id. 363. Such is also the law in New Hampshire. *Holmes v. Knights*, 10 N. H. 175. But the courts of both North and South Carolina and Alabama repudiate this rule, and hold these verbal promises to be clearly not binding, if collateral to any implied liability on the part of a third person. *Draughan v. Bunting*, 9 Ired. 10; *Simpson v. Nance*, 1 Spears, 4; *Brown v. Adams*, 1 Stew 51.

Since the decision in *Green v. Cresswell*, the New York courts have overruled *Capin v. Merrill*, and conformed their adjudications to the English rule. In the case of *Kingsley v. Balcome*, 4 Barb. 131, an action was brought by the plaintiff to recover damages of the defendant, upon his undertaking or promising to save the plaintiff harmless from all damages by reason of his becoming bail for a third person, the plaintiff having in consideration of such promise become bail and been indemnified. It was held by the court, that a valid contract must not only be proved to have been made, but the same must be shown to have been in writing, and signed by the defendant, or by some one by him duly authorized to sign the same. Mr. Justice SILL, in delivering the opinion of the court, refers to the contrary holding in the case of *Chapin v. Merrill*, 4 Wend. 657, and says: "The court there correctly lay down the principle controlling this class of cases. When the promise is an original, absolute promise, it is not within the statute; otherwise, if it is collateral to the promise or undertaking of another;" but he denies the correct application of the principle in that case. And the court expressly declare that

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it is not sufficient that the promise arise out of some new and original consideration of benefit or honor moving between the newly contracting parties, but that this new original consideration spoken of must be such as to shift the actual indebtedness to the new promisor, so that he must be bound to pay the debt as his own, the original debtor standing to him in the relation of surety. Other cases in that State are to the same effect. *Farley v. Cleveland*, 4 Cow. 482; *Carville v. Crane*, 5 Hill, 483; *Barker v. Bucklin*, 2 Den. 45.

The case of *Easter v. White*, 12 Ohio St. 219 was elaborately and ably considered, and is identical with the case we are now reviewing. Easter, the plaintiff, brought an action against Eliza J. White, the defendant, stating in his petition in substance, that he, at the request of the defendant, and upon her promise to indemnify him against any loss in so doing, became a surety for one McDonald, in an undertaking in replevin; and that in an action against him on such undertaking, he was subjected to damage which he had been compelled to pay; and that the defendant refused to fulfill her promise of indemnity. One of the defenses was, that the defendant made no promise in writing to indemnify the plaintiff for becoming surety in the undertaking in replevin. The court, after a most exhaustive discussion of the whole question, held the defense a good one, and decided that the promise was clearly within the statute of frauds, and not being in writing, was not binding on the defendant.

The earlier cases holding that the promise is not within the statute of frauds are cited and condemned by Brown on Frauds, who expresses the opinion that they cannot be sustained by any just interpretation of the statute. Brown on Frauds, §§ 159-161.

Now the question to be determined in arriving at a correct conclusion is, whether the promise amounts to an original undertaking and is supported by a direct consideration, or whether it is collateral in its character, and depends upon some act to be omitted or performed by some third person. It is true there is some plausibility in the argument, that, where a request is made by one person to another to sign an instrument as surety for the benefit of a third party, and at the same time the person agrees to indemnify and save the surety harmless, and the surety becomes bound with that understanding, it is an original promise founded upon a sufficient consideration. But the agreement of the surety is not to incur any liability for the person making the request, but to be responsible for a third party's acts, which makes it an undertaking collateral to the original promise.

The case here presents a verbal promise by the defendant to indemnify the plaintiff against any loss by becoming surety for Wisner, and

others, as principal in an undertaking by them executed in a replevin proceeding. The bond which the plaintiff was to be indemnified for becoming surety upon was, under the provisions of the law, that the plaintiffs in that action, the principals, should duly prosecute the proceedings in replevin, and return the property if the same was adjudged to be returned, or to pay the damages and costs awarded. Therefore, the defendant's promise to indemnify the plaintiff against any loss in so becoming surety would surely seem to be a promise to answer for the default of others; that is, the default of Wisner and others, the principals in the bond or undertaking. The very consideration of the bond upon which plaintiff became surety was such that the plaintiff could only become liable to pay any thing by reason of signing the same as surety, upon Wisner and others making default in the return of the property or in the payment of the damage and costs adjudged against them.

The principal is always liable to remunerate his surety for all moneys paid in his behalf, and if the promise be regarded as one to make good by repayment any loss incurred as surety for Wisner and others, still it would only amount to an undertaking that, if Wisner and others should be in default in remunerating the plaintiff as their surety, the defendant would, in Wisner's and others' stead, answer for their default by saving the plaintiff from such loss.

In whatever aspect the case is presented, we can construe it in no other light than that the obligation of suretyship entered into by the plaintiff was to be a responsibility for the default of other persons, to-wit: Wisner and others; and that, therefore, the promise of indemnity made by the defendant was within the statute of frauds, and, being verbal, must be held incapable of enforcement.

This question has never before been directly presented in this court, and we are now to pass upon it for the first time. And we think that upon both authority and reason the promise comes clearly within the provisions of the statute. Within this view the judgment must be affirmed. All the judges concur.

Judgment affirmed.

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LEWIS, appellant, v. ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY.

(59 Mo. 495.)

Abatement — effect of death pending appeal. Master and servant — duty of master in providing proper machinery.

In an action to recover for personal injuries the plaintiff had judgment which was reversed by an intermediate court of appeal; and he then took an appeal to the court of last resort; and while this was pending he died. *Held*, that the action was not abated.

Plaintiff, while in defendant's employ as a brakeman, was injured by a defect in defendant's road-bed, of which the section foreman, whose duty it was to keep the road-bed in repair, had notice. *Held*, that the negligence of such foreman was the negligence of the company, and that defendant was liable.

ACTION to recover damages for an injury occasioned through the negligence of defendant's agent. The opinion states the case.

Everett Pattison, for appellant.

Dryden & Dryden, for respondent.

WAGNER, J. This was an action brought by the intestate, who was the plaintiff below, to recover damages for the loss of a leg while serving as brakeman on defendant's road.

The petition alleged that on the 15th day of June, 1869, plaintiff was injured while in the discharge of his duties as brakeman in coupling cars, without carelessness or negligence on his part, through the negligence, carelessness, and want of proper care and prudence of defendant in the management of its railroad, in this: that it permitted deep and dangerous holes to remain open in the ground and road-bed, between its side track and the main track, into which plaintiff stepped, whereby he was thrown downward, his foot was thrown upon the track and run over, and crushed by the wheel of the car. It was further alleged, that the existence of the hole into which the plaintiff stepped was not known to him, but that the hole was left by defendant after it was notified of its existence, and knew, or ought to have known, that it was unsafe and dangerous to its employees; that as a result of the injury he twice suffered amputation — once between the ankle and the knee, and afterward between the knee and the hip. Wherefore damages were prayed.

The answer denied negligence, carelessness or want of care on the

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part of defendant, in permitting deep and dangerous holes in the ground and the road-bed, between the main and side track; admitted that plaintiff received injuries from having his foot run over by the cars, but denied that the same was caused by the negligence of the defendant, and averred that it was occasioned in part by an unforeseen and inevitable casualty, and in part by the carelessness and want of prudence of the plaintiff directly contributing thereto.

The answer also denied that defendant's road-bed was in a dangerous condition, or that it permitted deep and dangerous holes therein, but stated that whatever its condition, it was well known to plaintiff at and before the happening of the injury; denied that there was any hole in the ground near the side track of its road, or that it had any notice of any hole being there, before the happening of the injury, and denied that the plaintiff stepped into any hole.

The evidence, in brief, showed, that about daylight, on the morning of the 15th of June, 1869, the train, composed of freight cars, and called the dispatch train, arrived at the "ore switch," a switch or side track on defendant's road, between St. Louis and Carondelet. The train was in charge of T. J. True, as conductor, and plaintiff and one Jones were the brakemen. On arriving at the "ore switch," the train was cut in two. One-half was backed down the side track, where plaintiff stood ready to couple the cars to some cars that were standing on the side track. Between the side track and the main track, a hole had been dug about two or two and a half feet from the side track. There were loose ties lying about, and some of these ties laid over and partially concealed the hole. When the cars came together plaintiff did the coupling, stepped along the cars as they moved, stepping partly forward and partly out toward the rail, until he reached the rail, when he took a step sideways to get clear of the cars; as he made this step, his right foot went into the hole, which caused him to fall, and in falling his left foot was caught by the wheel of the car, which ran over it and crushed it. At the time of the accident it was not sufficiently light to see very distinctly.

The evidence tended to show that the hole had been dug by steamboatmen, for the purpose of placing posts in it to tie their boats at the ore landing; that it had been there some three or four days, and that Jones, the other brakeman, had seen it two or three days before the accident, and complained of it to the section foreman. Plaintiff testified that he did not know of the existence of the hole until he stepped into it, and that he used great caution and prudence, though there was evidence going to show that he had been engaged in working on the switch every day since the hole had been dug.

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At the instance of the plaintiff, the court gave two instructions ; the first was as follows :

“ If the jury are satisfied, from the evidence in this case, that there was a dangerous hole between the main track and the side track of defendant's road, at a place where plaintiff was required or would be likely to step, in the discharge of his duties, whereby the risk of injury to plaintiff was increased, and that said hole was allowed to remain there after defendant knew of its existence, or might, by the exercise of reasonable care and diligence, have known thereof ; and if they further find that plaintiff received injuries in consequence of such hole having remained there after defendant knew or might have known of its existence, and that the plaintiff was exercising ordinary care and prudence at the time he received such injury, and did not know of the existence of said hole, then defendant is liable for such injuries.”

The second instruction relates the measure of damages, and is not objected to here.

For the defendant, the court declared the law to be :

“ If the jury believe, from the evidence, that plaintiff was daily in the habit of passing along and over that part of the track of the defendant's road where the hole spoken of by the witnesses was situated, and that said hole was plainly visible to a man in the possession of his senses and faculties, the plaintiff cannot recover in this action, although the jury should believe that the plaintiff fell into said hole, and in consequence was run over and hurt by the cars.”

“ If the plaintiff knew of the exposure to danger in coupling cars upon the “ ore switch ” of the defendant, because of the hole or holes alleged to have been dug in the road-bed of said switch, and the danger of stepping into said hole or holes, and with such knowledge consented to and did continue to remain in the service of the defendant as brakeman, and was thereafter thrown down by means of stepping into one of said holes, and was injured and crippled as in the petition charged, then the plaintiff cannot recover from the defendant for any negligence in permitting said holes to remain in said road-bed.”

“ In determining the question of carelessness and negligence on the part of the plaintiff, the jury will take into consideration all the facts and circumstances proved, including the condition of the track between the “ ore switch,” and the main track, the quality and quantity of light at the time the plaintiff attempted to couple the cars, and if, from all the evidence, they believe that negligence or want of ordinary care and prudence on the part of plaintiff directly contributed to the happening of the accident which caused the injuries sued for, they will find for the defendant.”

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And of its own motion the court gave this additional declaration :

"The court instructs the jury that the plaintiff, as a servant of defendant, assumed all the risks attending the employment he undertook. If, therefore, the jury believe, from the evidence, that the plaintiff was injured by and through the negligence of his fellow servant in the same general employment, the plaintiff cannot recover.

Defendant asked for six additional instructions, which the court refused. The jury found a verdict for the plaintiff, upon which judgment was rendered. This was reversed by the court at General Term, and the plaintiff appealed.

During the pendency of the appeal in this court, the plaintiff died, and his administrator now comes in and asks to be made a party, and this is resisted on the ground that the suit abated on the death of the plaintiff. This preliminary question must, therefore, be first disposed of.

It is insisted that the action died with the person, and as the judgment in his favor was reversed, it was thereby entirely destroyed or annihilated, and nothing was left but a simple right to recover, which would abate at his decease. Had the reversal been in a court of last resort, where it would have been necessary to have had a new trial on the merits, this effect might have been ascribed to it. The judgment in that event would not only have been annulled, but all the subsequent proceedings would have been on the original cause of action. But now if the judgment of the intermediate court—the General Term—is reversed, the effect is to restore the judgment of the trial court. *Rankin v. Perry, adm'r*, 5 Mo. 501 ; *Strouse v. Drennan*, 41 id. 289.

The operation of the judgment is suspended, but new life and validity may be imparted to it. Where, in a transfer of a suit from the Circuit Court to the Supreme Court, the plaintiff died after it was removed to the latter court, a motion to abate the suit was denied, and it was revived in the name of the personal representatives. The court said that by the recovery in the life-time of the injured party, the claim for damages was merged in the judgment, and became a debt, with which the personal representative was chargeable ; that there was a difference between a simple appeal and an appeal in the nature of a writ of error, the latter merely suspended the judgment of the inferior court, but did not annul it. *Kimbrough v. Mitchell*, 1 Head, 539.

The correct doctrine seems to be, that where an appeal is in the nature of a writ of error, and only carries up the case to the Court of Appeals, as an appellate court for the correction of errors that may have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, re-

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versed or modified; and the court has no other than appellate powers, to affirm, reverse or modify, then such appeal does not vacate but merely suspends the operation of the judgment.

The instruction given for the plaintiff is the material question complained of as error in this cause. It is contended that it was wrong, because it told the jury that defendant was responsible if the risk of injury to plaintiff was increased by the hole being there, and it was allowed to remain after defendant knew of its existence, or might, by the exercise of reasonable care and diligence, have known thereof, and that the injury was received in consequence of the hole remaining after defendant knew, or might have known, of its existence. The instruction, however, declares at the same time, that it was necessary that the plaintiff should have exercised ordinary care and prudence in order to enable him to recover.

The rule has long been established, and it is founded in justice and reason, that it is the duties of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers or servants or others. They are bound to furnish a safe road, and sufficient and safe machinery or cars. The legal implication is, that the roads will have and keep a safe track, and adopt suitable instruments and means with which to carry on their business. They can provide all these by the use of the requisite care and foresight, and if they fail to do so, they are guilty of a breach of duty, and are liable for the consequences. *Gibson v. Pac. R. R. Co.*, 46 Mo. 163; S. C., 2 Am. Rep. 497; *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197.

Under this rule it is held that the companies are liable for the existence of all defects which they knew, or by reasonable care and diligence might have known. *Gibson v. Pac. R. R. Co.*, *supra*; *Ryan v. Fowler*, 24 N. Y. 410; *Noyes v. Smith*, 28 Vt. 59; *Hayden v. Smithfield Manf. Co.*, 29 Conn. 548.

In the case of *Snow v. Housatonic R. R. Co.*, 8 Allen, 441 it was decided that a railroad company might be held liable for an injury to one of its servants, caused by a want of repair in the road-bed.

There the plaintiff was injured in coupling cars, and in coming out from between the cars, he stepped into a hole which was permitted to remain on the side of the track, and the train caught his other foot and it was crushed, and the amputation of a leg became necessary. The plaintiff himself swore that he had known of the existence of the hole for some time, and had complained of it to the repairer of the track, and it was urged in the argument for the defendant that the omission to re-

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pair the defect which occasioned the injury, was the result of the negligence of the person whose duty it was to see that the track was kept in a safe and proper condition, and that the accident was, therefore, caused by the carelessness of a fellow servant. But this position was denied by the whole court. BIGELOW, C. J., in writing the unanimous opinion, said: "But this argument leaves out of sight the real ground on which the liability of the defendants rests. If the argument is well founded, then it would follow that as a corporation can only act by agents or servants, it would escape all responsibility for every species of injury caused by the defective machinery and apparatus, or badly constructed tracks, or insufficient bridges and other similar causes. So an individual could avail himself of a similar immunity if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has already been said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty."

The same principle has recently been reiterated in the same court (*Ford v. Fitchburg Railroad Co.*, 110 Mass. 240; S. C., 14 Am. Rep. 598), and the doctrine extended even further. The plaintiff was an engineer engaged in running a locomotive engine, and was injured by an explosion of his engine, which was old and out of repair. It was objected to the maintenance of the action, that the want of repair of the engine was caused by the negligence of a fellow servant, but the court overruled the objection, and in the opinion by COLT, J., it was said: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servant, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged where the employer is a corporation by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in

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operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them even when the same person renders service by turns in each, as the convenience of the employer may require it."

The same principle is decided in a recent case in the New York Court of Appeals (*Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; S. C., 13 Am. Rep. 545), where it is held that a corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance, and that as to such acts the agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which they are performed.

Mr. Redfield, in the last edition of his treatise on Railways, expresses the opinion that corporations should always be regarded as present in all acts performed by their agents within the range of their employment. Redfield on Railw. (5th ed.) 538, § 7.

It was the duty of the section foreman to keep the track in repair and see that every thing was safe. He was notified of the existence of the hole, and complaint was made to him about it, but he negligently omitted to act and failed to remedy the defect. Notice to him was notice to the company, and his negligence was the company's negligence. *Harper v. Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567; S. C., 4 Am. Rep. 358; *Brothers v. Cartter*, 52 Mo. 372; S. C., 14 Am. Rep. 424.

The same doctrine prevails in England as to the liability of the master. In *Holmes v. Clarke*, 6 Hurl. & N. 849, it was held that where machinery was required to be protected and kept in a certain way, and it was permitted to get in an unsafe condition, and complaint was made by a servant or employee during the period it was so out of repair, the master took upon himself the risk, and was responsible to a servant for any accident that happened. Assuming then that the jury found the facts to exist as stated in the instruction, the conclusion of law predicated thereon was more favorable to the defendant than many of the best adjudged cases would warrant.

Under the first instruction given for the defendant, it is evident that the jury must have found that the hole was not so plainly visible that the plaintiff must have known of it by using his senses and faculties; and this finding is sustained by the evidence, as it is shown that old ties were allowed to accumulate and remain there and partially cover up the hole. The second instruction precludes a recovery if the plaintiff

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knew of the danger and exposure of coupling the cars because of the hole being dug, and the verdict negatives any knowledge on his part. The next permits the jury to take into consideration all the facts and circumstances existing at the time, and surrounding the event, to determine whether the plaintiff was guilty of carelessness or negligence, or whether he contributed to the happening of the accident. Under these instructions the jury must have found that plaintiff, by his negligence, did not contribute to the injury, and also, that he did not know that the hole was there, and that it was not so plainly visible that it was carelessness to overlook it.

This was going a great deal further than some of the cases require.

In *Flike v. Boston & Albany R. R. Co.*, *supra*, the plaintiff knew there was a deficiency of brakemen, and in *Snow v. Housatonic Railroad*, *ubi supra*, the plaintiff was well aware that the hole which caused the injury existed, and yet in both cases the courts held that a recovery was proper, on the ground that it was the duty of the companies to furnish the necessary number of hands, and to keep the track safe and in good order, and that a failure to do either was a violation of their contract with their servants or employees.

The instruction given by the court told the jury that the plaintiff, as a servant of the defendant, assumed all the risks attending the employment he undertook. If, therefore, they believed from the evidence that he was injured by and through the negligence of his fellow servant in the same general employment, he could not recover.

There is an admittedly correct abstract proposition embodied in this instruction, but I doubt greatly whether it was correctly applied.

It is true in one sense, the section foreman, whose duty it was to superintend the track and keep it clear and safe, was a fellow servant, as all are to a certain extent fellow servants who are engaged in the same business or enterprise; but he represented the company in the line of his duty — he was the company in that regard — and his negligence was the company's negligence in a matter in which it owed a duty and obligation to its servants. If a mistake was committed, it was a mistake in favor of the defendant.

The instructions given covered the whole case, and were directed to every issue that could arise therein. It is unnecessary to enter into an examination of those refused. Some of them had already been given in substance, and the others were in correct.

The judgment at General Term should be reversed, and that at Special Term affirmed.

Judgment reversed.

Petition of Alexander.

PETITION OF ALEXANDER.

(59 Mo. 598.)

Criminal law — when bail will be taken after mistrial.

Defendant was indicted for murder in the first degree ; was twice tried and on both trials the jury was unable to agree, subsequently the jail wherein he was confined was broken open and other prisoners escaped but he refused to go. *Held* a proper case for allowing the privilege of bail.

PETITION for *habeas corpus*. The opinion states the case.

Dawson & Hale, for petitioner.

J. P. Altgeld, for respondent.

WAGNER, J. This is an application on behalf of the prisoner, to admit him to bail. He is under indictment for murder in the first degree, and the record of the proceedings accompanying the return shows that he has been twice tried, and on both occasions the jury were unable to agree. It is claimed that these disagreements of the jury create such a doubt of the prisoner's guilt as entitles him to be bailed.

The bill of rights incorporated in the Constitution of this State, declares "that all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great."

The general rule is, that bail will be refused after indictment in capital cases ; for the indictment furnishes a strong presumption of guilt, and it is supposed the accused will almost always attempt to leave and elude the demands of justice. Hence, in all such cases there must be facts and circumstances which counteract or overcome this presumption, before bail will ever be admissible. That a man has been indicted for murder in the first degree, and tried twice, and the jury has been unable to agree, though not conclusive, is a strong consideration toward removing the presumption existing against him.

In the case of *The People v. Perry*, 8 Abb. Pr. (N. S.) 27 it was held that where the prisoner was indicted for murder in the first degree, and had been twice tried, and on both occasions the jury were unable to agree, was a proper case for exercising the power to bail.

In *The State v. Summons*, 19 Ohio, 139, it was declared, that the court would not, as a matter of course, admit to bail because the jury, in a trial for murder, failed to agree upon a verdict. It was said, the fact that the testimony given on the trial did not produce full conviction of guilt,

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in the minds of the twelve jurors, would be a strong circumstance to urge to the court, when invoked to the exercise of the discretion of admitting to bail, and the fact would come with redoubled force, if a second jury should fail to agree upon a verdict ; but still the question after the mis-trials was, who was to decide whether the proof was "evident," or the "presumption great." And the conclusion was arrived at, that it must necessarily be the same authority which prescribes the amount of the bail, and passes upon the sufficiency of the sureties.

We would not be willing to lay down as an inflexible rule, that where there had been two trials for murder, and the jury had each time disagreed, that would show that proof was not "evident" or the "presumption great." There may be circumstances connected with trials which would produce a disagreement, which would entitle the prisoner to no claims whatever. The failure, however, to agree upon a verdict twice in succession is a strong consideration, and, coupled with other facts, may turn the scale, and show that the object sought may be attained by admitting to bail.

The imprisonment of the accused before trial forms no part of the punishment affixed to the crime. The whole object and end of imprisonment before trial is to secure the forthcoming of a person charged with the commission of a crime. Where a jury has disagreed twice upon the question of guilt, a doubt may well be raised, and where it is satisfactorily shown that the attendance of the accused to stand his trial will certainly follow, in the exercise of a sound discretion, the court may admit to bail.

When the prisoner committed the offense whereof he stands charged, instead of trying to make his escape, he immediately surrendered himself to the officers. Subsequently the jail wherein he was confined was broken open and the other prisoners escaped, but he refused to go. His whole conduct has evinced a determination to stand his trial and meet the consequences which may finally ensue. We have, therefore, reached the conclusion, that, under all the circumstances, it would be the exercise of a sound discretion to permit bail to be given in this case.

It is argued that this court has no right to admit to bail, but we think otherwise. The Constitution gives the power to issue writs of *habeas corpus*, and hear and determine the same. The power to bail is a necessary incident to the right to hear and determine the cause. The statute regulating the practice in *habeas corpus* proceedings provides that where the offense is bailable the accused should be let to bail. Wagn. Stat. 690, § 38. It is not perceived for what purpose the court would be vested with authority for issuing the writ and bringing up the pris-

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oner if the power to bail or discharge, as the case might be, did not follow.

The prisoner will be admitted to bail upon his giving bond in the sum of \$15,000, with two or more sufficient sureties, conditioned as provided by law for bonds in criminal cases. If the bond is not given in this court, then the prisoner will be remanded, and the same may be taken before the judge of the Andrew Circuit Court, where the indictment is pending. Wagn. Stat. 691, § 42.

The other judges concur.

Ordered accordingly.

LINDELL v. ROKES, appellant.

(60 Mo. 249.)

Promissory note — consideration — agreement not to drink intoxicating liquors.

A promissory note was made payable on condition that the payee abstain for a certain time from the use of intoxicating liquors. *Held*, that the consideration was good.

ACTION on a promissory note. The opinion states the case.

Dawson & Edwards, for appellant. There is no mutuality in the conditions of the contract sued on. Lindell does not promise to abstain from drinking intoxicating liquors or beer during the period mentioned in the contract, nor does he stipulate to do any thing whatever. There is no promise, for a promise shown in the instrument, and it is a *nudum pactum*. *Burnet v. Bisco*, 4 Johns. 235; 2 Kent's Com. 464; 1 Story on Cont. (4th ed.), § 431; *White v. Bluett*, 24 Eng. Law & Eq. 484; *Sykes v. Dixon*, 9 Ad. & El. 693; 1 Parsons on Cont. 458, n. 2. A mere moral obligation is insufficient. 1 Story on Cont. (4th ed.), 253, 465, 466; *Smith v. Ware*, 13 Johns. 257; *Edwards v. Davis*, 16 id. 280; Chitty on Cont. (5th Eng. ed.) 51, 52; *Kick v. Merry*, 23 Mo. 73; *Dodge v. Adams*, 19 Pick. 429; *Mills v. Wyman*, 3 id. 207.

The consideration being duly expressed in the instrument, parol proof was not admissible to aid it. *Maigley v. Hauer*, 7 Johns. 840. There was no evidence to show that the smallest advantage had accrued to defendant from the performance of the contract by defendant. Story on Cont. (4th ed.) 431, and cases cited and note. The promise to pay the \$50 by the execution of the instrument did not operate as a vested to

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of that sum. *Powell v. Brown*, 3 Johns. 100; *Fink v. Cox*, 18 id. 145; *Pearson v. Pearson*, 7 id. 26; *Taylor v. Staples*, 5 Am. Rep. 556. Appellant relies especially on *Burnet v. Bisco*, *supra*, and *Utica & Syracuse R. R. Co. v. Syracuse*, 21 Wend. 139.

C. A. Anthony, for respondent. The instrument sued upon as the foundation of suit is a promissory note, and being in writing imports a sufficient consideration. Wagn. Stat. 270, § 6; *Caples v. Branham*, 20 Mo. 246, 247; *Crow v. Harmon*, 25 id. 419, 420; Chitty on Cont. (10th Am. ed.) 26.

The promise is not void for want of mutuality. *Rose v. Railroad Co.* 31 Tex. 49; *Des Moines Valley R. R. Co. v. De Guff*, Iowa, 99; *Crow v. Harmon*, *supra*; *Caples v. Branham*, *supra*; 10 Am. Lead. Cas. 75, 118.

WAGNER, J. This was an action commenced by the plaintiff against the defendant on a promissory note, of which the following is a copy :

“ \$50.

MARYVILLE, MO., July 1, 1872.

“ I promise to pay Charles Lindell fifty dollars (\$50) March 1st, 1873, if he during the time from July 1st, 1872, to March 1st, 1873, will not use intoxicating liquors and beer of any kind.

“ H. ROKES.”

The cause was tried before a jury, and evidence was adduced showing that plaintiff had not used intoxicating liquor or beer of any kind during the period specified in the note, and there was a verdict and judgment in his favor.

Defendant objected to the introduction of any evidence by the plaintiff, on the ground that the note was illegal for want of mutuality and consideration. The same objections were also made in the shape of instructions; but they were overruled.

It is true that the plaintiff did not undertake, in direct terms, to do any thing when the note was made, but the prevailing doctrine now is, that if one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory.

Our statute provides that all instruments of writing made and signed by any person or his agents, whereby he shall promise to pay to any

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other or his order, or unto bearer, any sum of money or property therein mentioned, shall import a consideration, and be due and payable as therein specified. 1 Wagn. Stat. 270, § 6.

The note imported a consideration, and it was only incumbent on the plaintiff to show that he had complied with its terms. The case of *Hempler v. Schneider*, 17 Mo. 258, is in point. There Schneider promised to pay Hempler, for Wilhelm Nauman, the sum of \$200 for goods received, in case Nauman did not return to St. Louis within fifty days. It was held that Schneider was liable for the full amount of the note, whether Hempler sustained any damage by Nauman's not returning within the time or not. "This court," said Scott, J., "is not aware of any law which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident or mistake in their creation. The plaintiff may have sustained no damage in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." So, where the defendant promised to pay the plaintiff \$100 if a certain county road was not opened or kept open, or if the plaintiff should have the proceedings opening it annulled, it was decided that the promise, it being in writing, was within the statute, and imported a sufficient consideration. *Crow v. Harmon*, 25 Mo. 417.

The note of itself, in the present case, imported a good consideration, and it requires no argument to combat the position that a promise made in consideration that a person shall abstain from the use of intoxicating liquor is illegal as against public policy.

The judgment should be affirmed, and with the concurrence of the other judges it will be so ordered. The other judges concur.

Judgment affirmed.

SLOAN, appellant, v. PACIFIC RAILROAD COMPANY.

(61 Mo. 24.)

Constitutional law — obligation of a contract — right of railroad to regulate rates.

The charter of a railroad conferred upon the company the power to regulate its tolls for a certain length of time. During that time the legislature passed an act to regulate the same tolls. *Held unconstitutional.*

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ACTION to recover a penalty imposed for the breach of a statute. The opinion states the case.

Rogers & White, for appellants.

James Baker and *J. N. Litton*, for respondent.

NAPTON, J. On the 1st day of April, 1872, the legislature of this State passed an act entitled "An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in the State for the transportation of freights on said roads." The first section of this act is as follows :

"No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State, now in force or which may hereafter be enacted, shall directly or indirectly charge or collect for the transportation of goods, merchandise or property on its said road, for any distance, any larger or greater amount as toll or compensation than is at the same [time] charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road ; nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith which it has a right to use ; nor shall any such railroad corporation charge or collect for the transportation of goods, merchandise or property over any portion of its road a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property, over any other portion of its road of equal distance ; and all such rules, regulations or by-laws of any railroad corporation as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void."

The third section of this act prohibited any railroad company from increasing its rates of toll for transportation, etc., from one point to another, by reason of any decrease in its rates required by the first section, and declared that the rate of toll after the passage of the act should not be altered from what it was in the same month and day in the year 1871.

The fourth section declared a forfeiture of \$1,000 for any breach of this act, to be recovered by any person aggrieved.

This suit is for a violation of this act by the defendant, setting out thirty-one breaches of the act, and claiming \$1,000 for each breach. In each count the allegation is that defendant charged and received a greater

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sum for transporting certain merchandise from St. Louis to Warrensburg than it charged for transporting the same class of freight in similar quantities from St. Louis to Kansas City, the distance from St. Louis to Kansas City being $63\frac{1}{2}$ miles greater than from St. Louis to Warrensburg.

The defendant answered, admitting the facts charged, but asserting that under its charter, dated March 12, 1849, and an amendatory act passed March 1, 1851, and under the act of March 31, 1868, the right to regulate its rates of freight, etc., was left exclusively to defendant. The answer, moreover, alleges that the rates were reasonable, and that the discrepancy stated was owing to the competition which the road had to meet at Kansas City from other lines of railroad and from steamboats, and denies the validity of the act of 1872.

To this answer the plaintiffs demurred for various reasons :

1. Because the provisions of defendant's charter are not impaired by the act of 1872.

2. Because the charter of defendant does not authorize it to make any such regulation of freights as is provided against in the act of 1872.

3. Because the act of 1872 is a police regulation, authorized by the laws of the State and of the United States.

4. Because defendant's road is a public highway, and the act of 1872 is not void.

5. Because the charter of defendant does not exempt it from the operation of the law of April 1st, 1872, under which these proceedings were had.

The court overruled the demurrer, and the plaintiffs electing to stand thereon, a judgment for defendant was entered, and the case comes here by appeal.

The questions presented by this case have been discussed very elaborately and with great ability on each side ; but we think the determination of the case depends on the single question whether this act of 1872 is a valid act so far as the present defendant is concerned.

It is scarcely necessary to refer to the original charter of the defendant because the act of the legislature of March 31st, 1868, under which the present company bought the road, is a change of the original charter. That act declared that " The said railroad company shall be subject to the provisions of the general laws of the State, now in force or hereafter to be enacted, classifying freights and fixing the regulation rates and charges for the transportation of freights and passengers by the railroad in this State ; provided, that the provisions of this section subjecting the Pacific Railroad to future legislation shall not take effect for ten years after the passage of this act."

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This act undoubtedly recognizes the fact that previous to its passage, the Pacific Railroad was not subject to any regulations of the legislature, classifying freights or fixing the rates of transportation, but subjects the road to such legislative regulations after 1878.

The charter of this company had provided that the company "should determine the terms, conditions and manner in which merchandise, property and passengers should be transported thereon, and that such company should receive such tolls and freights as may be determined on by the directors, and should keep posted up statements of the rates of tolls and freights to be charged."

We hardly think it necessary to revert to the Dartmouth College case to justify the assertion that private corporations, although established for public uses, are still entitled to such rights as the legislature creating them has bestowed in their charter or acts of creation. If the rights so bestowed are inconsistent with, or embarrass the power which legislatures cannot part with, then such renunciation, by the legislatures, would be of no avail, and not bind their successors. It is not contended in this case that a legislature may not part with its right of taxation — one of the most important attributes of sovereignty. The contrary has been asserted by the Supreme Court of the United States and its decisions have been acquiesced in. The right to regulate the tolls on a road is a matter of inferior importance to the State, and if the right of taxation may be abandoned, it is difficult to perceive why the right of regulation of tolls may not be transferred to the corporation.

The power to regulate tolls is then granted to this defendant, not merely by its charter but by the act of 1868, under which defendant bought. This right, it is conceded, is subject to the inherent right of this State to make police regulations and to the common-law right of every citizen to hold a common carrier responsible for every violation of the railroad company of its duty as a common carrier.

The act of 1872 undertakes to define the obligations of railroad companies, and to declare that a charge for one distance, if it exceeds a charge for a longer one, is an unjust discrimination. It may be so; but whether it is or not, is a question for the courts to decide and not the legislature. The act of 1872 declares that such discrimination is an unjust one, without regard to any circumstances whatever. In other words, the legislature, by this act, assume a power which the charter had originally granted to the company, and which the act of 1868 had continued to confide in the company for ten years after the passage of that act, and the only question is, whether the act of 1868, under which this road is now held, is a valid act; for if it is, then, primarily, the defendant is invested

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with the power to fix its rates of freight and passage, subject to such police regulations as the State always retains power to make. This term, "police," is a very indefinite one. Perhaps Judge COOLEY's definition may be considered as exact a one as we shall find: "Police regulations," says the author, "must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter or curtailment of the corporate franchise."

This subject was thoroughly examined in the Court of Errors and Appeals of the State of Delaware, in the case of *The Philadelphia, W. & B. R. R. Co. v. Bowers*, 4 Houst. 506, a case very much like the present in all respects. In that case, it was held that the power of the company to adjust its tariff of charges by its own officers according to their views of the necessities of business and of justice to the public, having been confided in the franchise granted to the company, without any reservation of legislative supervision or control, the legislature of the State had no right to assume control of such regulations, and undertake to fix, by law, different rates from what the company had fixed; that the power thus granted to the company was an essential one to the enjoyment of its franchise, and must be presumed to have been the consideration for which the corporators accepted the charter. And in regard to the police power, it was held that the legislature may, at all times, regulate the exercise of the corporate franchise by general laws passed for the peace, good order, health, comfort and welfare of society, but that under the color of such laws it could not destroy or impair the franchise, nor any right or power essential to its beneficial exercise.

In this opinion of the Court of Appeals of Delaware, we heartily concur; it being understood that any citizen has the right, without regard to charters, and without any act of the legislature, to hold the company responsible for any breach of its duty as a common carrier, in charging exorbitant freights or tolls, or in making unjust discriminations.

The objection to the act of 1872 is, that the legislature undertook to pronounce certain discriminations unjust, made by the company. This the legislature had no power to do. The right to fix the tolls had been already confided to the defendant until the year 1878.

An arbitrary rule was adopted by the legislature determining that certain rates were unjust. Whether they were so or not, was a matter depending on circumstances, of which the legislature were not made

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judges. The liability of the defendant at common law and on general principles not abrogated by the legislature, was a matter for the determination of courts of justice with the aid of juries. *New England Ex. Co. v. Maine Cent. R. R. Co.*, 57 Me. 188; *McDuffee v. The Portland & R. Railroad*, 52 N. H. 480; *Att'y-Gen'l v. R. R. Co.*, 35 Wis. 482.

We are, therefore, all of opinion that the act of the legislature of April 1, 1872, was invalid, so far as it affects the defendant.

Judgment affirmed.

KOEHRING v. MUEMMINGHOFF, appellant.

(61 Mo. 408.)

Promissory note — interest, when payable — parol evidence to contradict note.

A promissory note was made payable five years from date "with interest from date at the rate of eight per cent per annum." *Held*, (1) that on the face of the note the interest was payable at the maturity of the note and not annually; and (2) that the language being plain and unequivocal, parol evidence of an agreement to pay interest annually was not admissible.

ACTION of ejectment. The opinion states the case.

J. O. Kiskaddon, for appellant, cited *Bander v. Bander*, 7 Barb. 560; *French v. Kennedy*, id. 452; *Edw. on Bills*, 709; 1 Am. Lead. Cas. 614; *Ferry v. Ferry*, 2 Cush. 92; *Hastings v. Wiswall*, 8 Mass. 455; *Greenleaf v. Kellogg*, 2 id. 568; *Cooley v. Rose*, 8 Mass. 221; *Bannister v. Roberts*, 35 Me. 75; *Doe v. Warren*, 7 Greenl. 48; 1 Greenl. Ev., §§ 275, 278, 280; *Murdock v. Ganahl*, 47 Mo. 135; *Walker v. Engler*, 30 id. 130; *Woodward v. McGaugh*, 8 id. 161; *Massman v. Holscher*, 49 id. 87.

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John R. Martin, for respondent.

VORIES, J. This was an action of ejectment brought in the Franklin Circuit Court to recover a tract or tracts of land in the petition described. The petition was in the usual form. The answer was a denial of the facts stated in the petition.

The trial was by the court, a jury having been waived by the parties.

It was admitted by both parties that William Kelso was the common source of title under which both parties claimed. The plaintiff on his

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part offered in evidence, which was read without objection, a deed by which the land in controversy was conveyed by William Kelso and wife to the defendant. This deed appears to have been executed on the fourth day of June, 1871.

The plaintiff next offered in evidence a deed, commonly called a deed of trust, bearing the same date of the deed previously read in evidence, by which the land in controversy was conveyed by the defendant and his wife to William Kelso in trust to secure the payment of a promissory note, executed by the defendant, by which he promised to pay to the order of J. H. Koehring the sum of \$3,800. The promissory note secured by the deed of trust is copied in the deed and reads as follows :

“\$3,800.

WASHINGTON, Mo., *June* 14, 1871.

“Five years after date I promise to pay to the order of J. H. Koehring, \$3,800, for value received, negotiable and payable without defalcation or discount, with interest from date at the rate of eight per cent per annum.

“GERHARD MUEMMINGHOFF.”

After setting forth the note as above copied, the deed of trust proceeded to set forth the following condition upon which the conveyance was made, to wit: “Now, if the said note be well and truly paid when the same shall become due and payable, according to the tenor and effect thereof, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part; but should default be made in the payment of the said note, or any part thereof, or the interest that may accrue thereon or any part thereof, as the same shall become due and payable, then this deed shall remain in force, and the party of the second part,” etc. The deed then proceeds to give the trustee power to sell by giving twenty days’ notice, in form that is unobjectionable, and concludes in the usual form.

This deed was objected to by the defendant, for the reason that it appeared by said deed that no breach of the condition thereof had yet occurred. The court overruled the objection and admitted the deed in evidence, to which action exceptions were saved.

The plaintiff next offered in evidence a deed dated the 10th day of August, 1872, from Kelso, the trustee in the deed of trust read in evidence, to J. H. Koehring, plaintiff, as trustee for Maria E. Koehring, attempting to convey the land in question to said Koehring, under the power in the deed of trust. This deed was also objected to by the defendant, because it appeared that no breach had been made of the

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conditions in the deed of trust, and that the trustee in the deed of trust therefore, had no power to sell the land named. This objection was also overruled, and the deed read, to which the defendant again excepted.

The plaintiff then introduced one Wilhelmi as a witness, who testified that he drew the deed of trust, and the note described therein; that the parties at the time informed him that interest was to be paid annually; that he understood that the words "per annum," used in the note, meant that the interest was to be paid every year; that he had so informed the parties to the note, and that they had assented to the drawing of the note in that language. The witness further stated that the words "per annum" mean every year, and that he had told the defendant at the time, that by the terms of the note the interest was payable every year; that he said it was all right.

The defendant, at the time, objected to this oral evidence on the ground that parol evidence was not admissible to vary or add to the note and mortgage read in evidence. This objection being also overruled, objections were again saved. The defendant introduced no evidence. There were several declarations of law given and several refused by the court, to which objection is made, but as they raised no questions of law not raised by the evidence, they will not be noticed. The court rendered a judgment for the plaintiff for the possession of the land and damages. The defendant then made an unsuccessful motion for a new trial, and appealed to this court.

It will be seen from the foregoing statement of this case that the only questions to be considered by this court are, first, as to the proper construction to be given to the note secured by the deed of trust read in evidence; and second, whether oral evidence was properly received by the court, to assist in its proper construction?

The language of the note, so far as it is material to its proper construction as it affects this case, is: "Five years after date, I promise to pay to the order of J. H. Koehring, \$3,800, * * * with interest from date at the rate of eight per cent per annum."

It is contended by the plaintiff that the language used is properly construed to be a promise by the defendant to pay the interest, on the sum secured by the note, annually, or if this is not the proper construction of the language of the note, then oral evidence was admissible to show that that was the understanding of the parties at the time, by the use of said language.

We do not agree with the plaintiff in either view of the question as taken by him. Whether the interest accruing on a promissory note

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should be paid annually, monthly, or at any other specified period, depends in each case upon the contract or agreement of the parties. There is no rule of law independent of any contract to that effect, requiring interest on promissory notes to be paid annually. *Bander v. Bander*, 7 Barb. 560, and cases cited. In the note under consideration, the promise in the note was to pay the sum of money named, "with interest from date at the rate of eight per cent per annum," five years after the date of the note. No different time is fixed for the payment of the interest from that fixed for the payment of the principal secured to become due by the note. In such a case both principal and interest become due at the same time; in fact the promise plainly is to pay the principal, with the interest, five years after the date of the note. The words "with interest at the rate of eight per cent per annum," only fix the rate of interest to be calculated on the note, and have nothing to do with the time that it shall be paid. 1 Am. Lead. Cas. 614; *Cooper, adm'r, v. Wright*, 3 Zab. 200, and the case in the 7th Barb. before cited.

It almost necessarily follows, from what has already been said, that the second question raised in the case must also be settled in favor of the defendant. The rule of law in reference to the admission of oral evidence to explain a promissory note or other written contract is, that the instrument should be construed according to the intention of the parties. To ascertain this intention, resort is first had to the language of the instrument, and if the language of the contract appears to be perfectly plain and capable of a legal construction, nothing dubious appearing upon the face of the contract, then the force and effect to be given to the contract must be determined by its terms, and oral evidence cannot, in such case, be heard to give the contract a different construction from that imported by its terms. To illustrate this rule, Mr. Greenleaf, in his work on Evidence, uses this language: "It is to be observed that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court in such case is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction;

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that is, when the true sense is ascertained, to subject the instrument in its operation to the established rules of law. And where the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. Thus, where no time is expressly limited for the payment of the money in a special contract in writing, the legal construction is, that it is payable presently, and parol evidence of a contemporaneous verbal agreement for the payment at a future day is not admissible." 1 Greenl. Ev., § 277.

The admission of the parol evidence upon the trial of this case would seem to be plainly in conflict with the rule above stated by Greenleaf. The only object of the parol evidence in this case must have been to contradict the writing, as it appears in the promissory note. The plain and legal interpretation of the note as the parties made it is, to make both principal and interest of the note due five years after its date. The oral evidence received by the court would make the promise of the defendant, one to pay the interest annually, and thus import new and additional words into the note, which is not permissible. 7 Barb. 560, above referred to; *Murdock v. Ganahl*, 47 Mo. 185; *Massman v. Holscher*, 49 id. 87; *Thornton v. Mc Gaugh*, 8 id. 161; *Huse v. Mc Quade*, 52 id. 388.

It follows that as the note named in the deed of trust was not due until five years after its date, and the sale having been made by the trustee named in the deed of trust a little more than one year after the execution of the note, and long before any default was or could be made by the defendant in the payment of the debt secured by the deed of trust, said sale and the deed made in pursuance thereof were without authority and void, at least so far as it pretended to foreclose the defendant's right to redeem upon the payment of the debt and interest when it became due, and the defendant could not be dispossessed of his land until default had been made.

The judgment must, therefore, be reversed, and the cause remanded.
All the other judges concur.

Judgment reversed

Sheedy v. Second National Bank.

SHEEDY, appellant, v. SECOND NATIONAL BANK.

(62 Mo. 17.)

Attachment — garnishee — debtor of partnership not liable in action against individual members.

In an action against J. S. alone, a person indebted to a partnership of which J. S. is a member is not liable as garnishee.

ACTION of attachment in which the Second National Bank was garnished. The opinion states the case.

J. O. Broadhead, with Broadhead & Overall, for appellant. The interest of one partner in a debt owing to an abundantly solvent partnership composed of two equal partners, as is the case here, may be attached by a creditor of one of the partners, for the separate debt of that partner. Colly on Part., § 822, p. 704, and notes; *Douglas v. Winslow*, 20 Me. 89, 92, 93; *Pierce v. Jackson*, 6 Mass. 242; *Allen v. Wells*, 22 Pick. 450; *Dow v. Sayward*, 12 N. H. 276–7; *Morrison v. Blodgett*, 8 N. H. 238; Story on Part. 392, §§ 261, 263, 397; 1 Parsons on Cont. 205; *Moody v. Payne*, 2 Johns. Ch. 548; Bish. Prin. Eq., §§ 520, 521; *Moore v. Pennell*, 52 Me. 162; *Russ v. Fay*, 29 Vt. 386; 7 How. Pr. 229, 383; 7 Ind. 39; 8 id. 1; 26 id. 422; 3 Ala. 319; 34 id. 722; 20 Ga. 386.

Money or debts due the firm are in nowise distinguished from other effects or assets, as respects their liability to attachment or garnishment for the separate debts of a partner. *Thompson v. Lewis*, 34 Me. 169; *Wallace v. Patterson*, 2 Harr. & McH. (Md.) 463; 29 Vt. 162; *McCarty v. Emlen*, 2 Dall. (Penn.) 277; *Lewis v. Payne*, 1 Leg. Gaz. (Penn.) 508; 2 Yates (Penn.), 190; *Ohatzel v. Bolton*, 3 McCord (S. C.), 33; *Robinson v. Tevis*, 38 Cal. 611. In this case had the necessity existed for the money due from the Second National Bank to James Streeter & Co., to be held and applied by the partners to the partnership debts, all their rights appertaining thereto could have been determined, had the court below sustained the motion of appellant to compel them to be brought in as parties, when the garnishee's answer showed that these were interested jointly in the debt. Or the parties, or either of them, could have interpleaded, for they were fully aware of the proceeding, both of them and their book-keeper being witnesses in the case.

In all the authorities adverse to our position in this case, the necessity of applying the money and credits of the firm to partnership debts, in the

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first place, and the alleged difficulty in this kind of a proceeding, of determining whether solvent or not, and also the uncertainty of the interest of the partners in the fund, have been the reasons urged in support of, and the question upon which depended, the decisions of the courts. But in this case no such reasons exist, or can in the remotest degree apply.

E. B. Sherzer, also for appellant. I. When, upon the pleadings and proofs, the solvency of a partnership is established, and the interest of a partner therein ascertained, such interest in a debt due such partnership can, by the process of a garnishment, be subjected to the payment of such partner's individual indebtedness. *Fisk v. Herrick*, 6 Mass. 271, 272; *Robinson v. Tevis*, 38 Cal. 611, 618, 619; *Mobley v. Lombard*, 7 How. (Miss.) 318, 320, 321; *Barber v. Hartford Bank*, 9 Conn. 407, 410; *Winslow v. Ewing*, 1 Ala. 129, 132. That without such ascertainment the interest of a partner in a debt or fund due the partnership can be garnished for his individual indebtedness, is maintained by the following authorities: *Wallace v. Hull*, 28 Ga. 68, 70, 71; *Chatzel v. Bolton*, 2 McCord, 478, 481; *Wallace v. Patterson*, 2 Harr. & McH. 463, 469; *McCarty v. Emlen*, 2 Dal. 278, 279; *Whitney v. Munroe*, 19 Me. 42, 45; *Thompson v. Lewis*, 34 id. 167, 170, 171; *Miller v. Richardson*, 1 Mo. 370; *Robinson v. Tevis*, 38 Cal. 611; *Parsons on Part.* (ed. 1867) 359, 360.

If the proposition is claimed to be inapplicable because garnishment is matter of strict law, we have authorities showing that the measure and value of a partner's interest can be ascertained in a replevin suit. *Rapp v. Vogel*, 45 Mo. 524, 526; *Gillham v. Kerone*, id. 487, 490; *Dilworth v. McKelvy*, 30 id. 149, 154. And execution may be levied on partnership effects to satisfy individual indebtedness. *Wiles v. Maddox*, 26 Mo. 77, 83. If claimed to be inapplicable because in execution tangible property is taken, and a debt is intangible, we say the statute knows no such distinction. Wagn. Stat. 664, § 1; 665, § 7; compare "Attachment," p. 184, §§ 18, 19, 30, 35; "Executions," 606, § 20; see, also, dissenting opinion, HOSMER, J., in *Church v. Knox*, 2 Conn. 522, 524, following out theory principles in *Wiles v. Maddox*, 26 Mo. 77.

If it be contended that the decisions in our State are opposed to the claim here made, it is submitted that *Kingsley v. The Missouri Fire Co.*, 14 Mo. 465, was decided before the new Code of 1849, blending law and equity, and in the opinion of RYLAND, J., given with hesitation, the action of the court seems based upon theory of garnishment being a matter of strict law (p. 468).

McDermott v. Donegan, 44 Mo. 85, merely states whatever would defeat creditors would be fatal in garnishment. It does not decide that a creditor's interest cannot be reached and made answerable for his indi-

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vidual debts. *Lackland v. Garesche*, 56 Mo. 266, 269, 270, 271, was a case in which the court called upon the trustee to account and perform his duties as trustee, and decides that garnishment can operate only upon effects not incumbered with the trust, and proceeds upon the idea, that in trusts continuing until a settlement had with beneficiary, chancery was alone competent to administer justice. But in the case at bar the garnishee is not a trustee. He has, indeed, a fund owing to, or is indebted to two who are partners, but their respective interests therein are ascertained by their own sworn testimony.

II. Certainly, inasmuch as the answer disclosed a person or persons, other than the individual debtor claiming an interest in a fund in the custody of the court, or of the law, such persons could and should be directed to establish their rights therein, and the court erred in overruling the motion designed to bring the parties interested, or claiming an interest in said fund before it. Our court, having both legal and equitable powers, in case of a fund or property brought, by suit at law, under its control, may compel partners claiming an interest therein to come in and interplead, or the farther and subsequent proceedings may be confined to equitable procedure. *Richardson v. Jones*, 16 Mo. 177; *Ladd v. Cousins*, 35 id. 518, 515; *Morrison v. Blodgett*, 8 N. H. 254; *Fisk v. Herrick*, 6 Mass. 271. And such appears to be the object and design of our statute. Wagn. Stat. 668, §§ 25, 26; id. 665, § 9; id. 666, § 12.

Clark & Dillon, with *Oline*, *Jamison & Day*, for respondent.

WAGNER, J. Plaintiff commenced his action against one Streeter, by attachment, and the defendant was garnished in the proceeding. At the return term defendant filed its answer to the interrogatories propounded, and stated that it was not indebted in any manner to Streeter, but that it was indebted to Streeter & Co., a copartnership firm composed of Streeter and one Rizer, and therefore asked to be discharged.

To this answer plaintiff filed a denial, and then set up affirmatively, among other things, that the garnishee was indebted to Streeter & Co. for money deposited by said firm with garnishee, and that the firm was solvent, and that both members of the firm were non-residents and had no creditor in this State except the plaintiff, and that all the moneys and effects of Streeter & Co. in this State were deposited with and in the possession of defendant. To this affirmative matter thus pleaded, the defendant demurred, for the reason that it was irrelevant and immaterial, and showed no cause of action against or liability of defendant as garnishee. This demurrer was by the court sustained.

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Plaintiff then moved the court to grant an order requiring Streeter and Rizer, the members of the firm, to appear and litigate, and show their respective interests in the fund. This motion was by the court overruled.

On the trial the facts stated in the answer were fully proved, and the court gave judgment for the defendant.

The important question which underlies this case is, whether, in an action by attachment against an individual, a person is liable to be garnished who is indebted to a copartnership of which that individual is a member. It is conceded that there is some conflict in the authorities upon this subject, but the cases greatly preponderate against the right of resorting to the process of garnishment under such circumstances. In *Kingsley v. Missouri Fire Co.*, 14 Mo. 465, it was held, that in a proceeding against a garnishee summoned in attachment as a debtor of a defendant, the plaintiff could not prove a joint indebtedness of the garnishee to the defendant and another person. In the opinion it is said that this remedy by attachment and garnishing is one of strict law, and if the debtor could not sue the garnishee alone on the debt, then the garnishee should not be held liable to the plaintiff in the attachment suit, for a debt due by him to the debtor and another, as the other would also be entitled to sue, and thus there would be two actions pending by two plaintiffs, for one indebtedness to them as a partnership. The question is carefully considered, and the authorities reviewed in *Drake on Attachment*, and the learned author declares the true doctrine to be, that the attachment of a debt due to a copartnership, in an action against one of the partners, is justly distinguishable from the seizure on attachment or execution of the tangible effects of the firm for the same purpose. The partnership property may be sold to pay the debt of one partner, but a debt due the firm cannot be taken by garnishment for that purpose. The reason for the distinction is, that in case of a sale the property cannot be appropriated until all liens upon it growing out of or relating to the partnership are discharged, while in the other case, the judgment against the garnishee, if acquiesced in, changes the right of property, and divests the copartner's title to the property attached, which cannot be done so long as the partnership accounts remain unsettled, or its debts unpaid. *Drake on Attach.*, § 567. The case of *Wiles v. Maddox*, 26 Mo. 77, is inapplicable here.

The point came up before Mr. Justice STORY, in a case where, in a suit against G. & G., the garnishee answered that he was indebted to G. & L., one of the defendants being a member of both firms. The court, in deciding against the liability of the garnishee, observed: "In order to adjudge the trustee responsible in this suit, it must be decided that the

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funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof that the principal debtor has an interest in each firm. If this be correct it will follow that a separate creditor of one partner will have greater equitable as well as legal rights, than the partner himself has. The general rule undoubtedly is, that the interest of each partner in the partnership fund is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent the same effect follows." *Lyndon v. Gorham*, 1 Gall. 867.

It must be borne in mind that garnishment is essentially a legal proceeding, and not adapted for the ascertainment and settlement of equitable rights between the garnishee and the defendant; and that a court of law has no power to act on the debt, until by an adjustment of the partnership affairs, it shall appear whether the defendant has any and what interest in the general surplus, or the particular debt.

There is another principle of law which is strongly antagonistic to the doctrine contended for by the plaintiff. It is this: As the attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and can acquire no rights against the latter, except such as the defendant had; and as he is not permitted to place the garnishee in any worse condition than he would be in if sued by the defendant, it follows, necessarily, that whatever defense the garnishee could urge against an action by the defendant for the debt in respect of which he is garnished, he might set up in bar of a judgment against him as garnishee. *Firebaugh v. Stone*, 36 Mo. 111; *McDermott v. Donegan*, 44 id. 85. It, therefore, results in this case, that Streeter could not have maintained an action against the garnishee, as one partner is incapable of suing for a debt due the firm, and if Streeter could not sue, the plaintiff cannot.

[The court then decided a point of practice.]

Judgment affirmed.

LAMMERT, appellant, v. LIDWELL.

(62 Mo. 188.)

Constitutional law — delegation of legislative power to popular vote.

An act provided that it should not be lawful for cattle to run at large in any county which, by a majority vote, should agree to restrain them. *Held*, unconstitutional, as a delegation of legislative power.

ACTION to recover the possession of cattle. The opinion states the case.

H. D. Wood and O. H. Howry, for appellant.

E. P. Johnson, for respondent.

WAGNER, J. This was an action to recover the possession of twelve head of cattle, the property of plaintiff, alleged to be wrongfully detained by defendant. The defendant, who acted as one of the constables of St. Louis county, justified the taking and detention of the cattle, under and by virtue of an act of the legislature of this State, approved March 20, 1873, entitled "An act to prevent domestic animals from running at large in those counties which, by a majority vote, may decide to agree thereto" (Sess. Acts, 1873, p. 70), and of an act of the legislature, approved April 1st, 1874, entitled, "An act to restrain domestic animals from running at large in the county of St. Louis, and to provide for the safe-keeping and sale thereof." (Sess. Acts, 1874, p. 239.)

A demurrer was filed to the answer, upon the ground that the matters therein pleaded constituted no defense to the plaintiff's cause of action. The demurrer was overruled, and the plaintiff declining to plead further, the interest of defendant in the property was, in accordance with the stipulation, assessed at \$20, and on motion of defendant a judgment for that sum was entered in his favor.

The only questions presented by the record are, whether the acts referred to are constitutional and valid. The first section of the act of 1873 declares that the County Court of any county in this State shall, upon petition of one hundred freeholders of the county, at any general election, and may, upon such petition of one hundred freeholders, at any special election, cause to be submitted to the qualified voters of the county the question of restraining any domestic animals of the species of horse, cattle, mule, ass, swine, sheep or goat, from running at large, by a ballot, to be written or printed, for restraining any one or all of the species of horse, cattle, mule, ass, swine, sheep or goat, or against restraining the same, to be canvassed and returned in like manner as votes for State and county officers.

Section 2 provides, that if a majority of the legal voters of the county, voting at the election, are in favor of adopting a stock law, then such county shall be governed by the provisions of the act, from and after one hundred and fifty days after it has been so adopted by the legal voters of the county.

The third section makes it unlawful, in any county adopting the act,

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for any animal, or animals, of the species named, to run at large outside of the inclosure of the owner, and provides for taking them up, and if they are not reclaimed within a certain time, and the owner does not make a reasonable compensation for feeding and taking care of them, they are to be regarded as estrays, and dealt with accordingly.

By the Constitution of this State the legislative power is vested in the general assembly, composed of the senate and house of representatives. They must exercise the legislative authority in the enactment of laws, and they cannot delegate their trust. The legislature cannot propose a law and submit it to the people to pass or reject it by a general vote, for that would amount to legislation by the people. But a law may be passed which is complete in itself, to take effect in a future contingency, or upon the happening of an event.

The question has been before this court upon several occasions, and the line of distinction has been drawn in reference to the different character of such laws. There is a general law upon the statute in regard to the incorporation of towns, investing the County Courts with power to declare them incorporated upon the performance of certain conditions by the inhabitants. This law was contested for the reason that it was a delegation of political power, and that the proceedings of the court were legislative in their character. But the statute was decided to be valid, on the ground that the corporation derived all its power from the law, and that the court merely gave the law application when certain conditions were performed by the inhabitants. *Kayser v. Bremen*, 16 Mo. 88; *State v. Weatherby*, 45 id. 17. So, acts of the legislature authorizing towns, cities and counties to subscribe stock in corporations, and incur expenses for different purposes, have been uniformly upheld. The validity of such laws has never been doubted since the decision in the *City and County of St. Louis v. Alexander*, 23 Mo. 488. The provision in the statute authorizing cities and towns to organize for school purposes, upon a vote of the people, has been declared constitutional (*State v. Wilcox*, 45 Mo. 458), and the township organization law was declared not to be liable to any objection, as it was a law which took effect from and after its passage, and where a majority of the voters in a county voted for it, their votes did not create the law, but placed the county voting for it within its provisions. *Town. Organ. Law*, 55 Mo 295.

It may now be conceded as the established doctrine, that statutes creating municipal corporations or imposing liabilities upon municipalities, or authorizing municipalities to incur debts and obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected — that is to say, the people of such districts may

decide whether they will accept the incorporation or will assume the burdens. This is the prevailing rule in reference to local measures. But in all these cases, the legislature had enacted a complete and valid law, according to the prescribed usages governing the passage of laws, and the happening of the contingency or the future event, which furnishes the occasion for the exercise of the power, gives no additional efficacy to the law itself. It derives its whole vigor and vitality from the exercise of the legislative will, and not from the vote of the people. But no body but the legislature can make or repeal a law. The provision of the road law of 1851, which declared that if the County Court of any county should be of opinion that the provision of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order; and thereupon order the roads to be opened and kept in good repair under the laws heretofore in force, or the special acts on the subject of roads and highways, were adjudged to be unconstitutional and void in this court, as attempting to confer upon the County Courts legislative power. *State v. Fields*, 17 Mo. 529.

In one of the leading cases on the subject, *Barto v. Himrod*, 4 Seld. 483, the legislature of New York framed a school law and submitted it to the people, one section providing that "the electors shall determine by ballot at the annual election to be held in November next, whether this act shall become a law;" and a further provision was made, in another section, that in case a majority of all the votes cast should be against the law, then the act should be null and void; but if the majority was in favor of the law, then the act should become a law and take effect. It was held that the law was unconstitutional; that the legislature had no power to submit a proposed law to the people, nor had the people power to bind each other by it. The legislature of Delaware passed an act to authorize the citizens of the several counties of the State to decide by ballot whether the license to retail intoxicating liquors should be permitted. By this act a general election was to be held, and, if a majority of votes in any county should be cast against license, it should not thereafter be lawful for any person to retail intoxicating liquors within such county, but if a majority should be cast in favor of license, then licenses might be granted in the county so voting, in the manner and under the regulations in the act prescribed. The court in that State held that the act was void, as an attempted delegation of the trust to make laws. *Rice v. Foster & Harr.* 479. So, in Pennsylvania, a license law was held unconstitutional on similar

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grounds. *Parker v. Com.*, 6 Penn. St. 507. The question was recently discussed in New Jersey, in a case testing the validity of the Local Option Law of that State, and the law was held to be constitutional, on the ground that municipal corporations and townships, or the people thereof acting collectively, might be invested with authority to regulate or prohibit the retail of intoxicating liquors. *State v. Morris Com. Pl.*, 7 Vroom, 72; S. C., 13 Am. Rep. 422. But the court placed the decision distinctly upon the fact that the legislature enacted the law, and that it derived all its force and vitality from the enactment.

The reasoning of the court was in perfect harmony with all the leading decisions. It was said that if the right to declare what the law shall be in one case may be referred to the people, the right to do so may be given in all cases, and thus the legislature may divest itself wholly of the power lodged in it by the fundamental law, until by subsequent legislation it shall be rescinded; that it is also obvious that it is not competent to delegate to the people the right to say whether an existing law shall be repealed or its operation suspended. To say that what is now the law shall not hereafter, or shall not for a specified time, be the law, is in effect to declare the law to be otherwise than it now is, and is a clear exercise of the law-making power. The will of the legislature must be expressed in the form of a law by their own act. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the law makers, but the voice of their constituents, which moulds the rule of action. If the vote is in the affirmative it is law; if in the negative it is not law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves, by a written constitution, to declare by their own direct action what shall be law.

After pursuing this course of argument the court declared, upon an examination of the act under consideration, that the test was whether the enactment, when it passed from the hands of the lawgiver, had taken the form of a complete law, and it was decided that it was a complete law. It denounced as a misdemeanor the selling of liquor without a license; so far as it was positive and free from any contingency. It left to the popular vote to determine, not whether it should be lawful to sell without license, but whether the contingencies should arise under which license might be granted.

Our form of government is a democracy, but it is a representative democracy. It is impracticable for the people to assemble in mass to make laws, hence the power was delegated to representatives chosen for that purpose. It is not only the right of the representatives, when as-

sembled in the legislature, to make laws, but it is their duty to do so. When the people, through the Constitution, delegated the law-making power to the legislature, it conferred an authority and imposed a duty which could not be exercised by any other body of men. Therefore, every law, to have any binding force or validity, must, when it emanates from the legislative body, have the form and character of a complete enactment. It must operate by virtue of the legislative authority, and not depend upon popular action or the people's suffrages for its vitality. If the law is regularly enacted according to the prescribed forms of legislative procedure, it may well be allowed to depend upon contingencies for its operation upon classes or localities, but it cannot be made to depend for its existence upon any other than the legislative will.

Is the law we are now considering in reference to the restraint of animals a valid law, or is it a mere proposition to the people of certain counties to make it a law if they see proper to do so? It is very evident that it can have no existence or obligatory force unless the same be imparted to it by a vote of the people. The title to the act does not purport to be the title of a general law or of a legislative enactment, but it declares that it is an act to prevent domestic animals from running at large in those counties which, by a majority vote, may decide to agree thereto; not an act of the legislature, but an act of the counties which may in reality adopt it. The title is a fair index and exponent of the true intent and meaning of the law. The first section provides that the County Court of any county may submit to the voters the question of restraining domestic animals, and then it is declared in the second section that, if a majority of the votes in any county is in favor of the restraint, then it shall be unlawful in that county for animals to run at large, according to the provisions of the third section. The fourth section prohibits the County Court from ordering a special election for the adoption of the law oftener than once in each year. In other words, this last section gives the voters of each county the authority, once in each year, to determine whether they will enact a law for their special benefit. If they decline, under the provisions of the first and second sections, to legislate on the subject, then the law has no existence. The law is entirely special in its nature, and whilst under the construction that has been given to the clause in the Constitution in regard to the special legislation, it has been held that the legislature was to judge whether the special law was needed or was applicable, it was at the most of even this construction a legislative discretion, and could be exercised only by the legislature. But here the legislature does not assume that even in its opinion the law is necessary in a given or particular

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county. It remits the question wholly to the county itself. The second, or amendatory act, is made entirely applicable to St. Louis county, and by the act the people of the county determine for themselves whether they shall enact a special law. It is true the last-named act does not provide for a new election, but the law only has any force or existence at all in the county by virtue of the election in the first instance. In examining the whole act I am unable to arrive at any other conclusion than that the law depends altogether on a vote of the people, and that it should be declared void, as being an attempt to exercise the law-making power by a body other than the legislature.

I, therefore, think the judgment should be reversed. All the judges concur, except Judge VORRES, who is absent.

Judgment reversed.

STRONG, appellant, v. PHOENIX INSURANCE COMPANY.

(62 Mo. 289.)

Judgment — when re-insurer bound by judgment against insurer — privity.

An action upon a policy of insurance was defended by the insurers by the advice and for the benefit of the re-insurers; but the plaintiff recovered judgment for damages and costs. In a subsequent action on the policy against the re-insurers—*held*, that they were bound by such judgment though not parties to the action.

ACTION on a policy of insurance. The opinion states the case.

Geo. P. Strong, for appellants. 1. The defendant had a common interest with the United States Insurance Company in the questions involved in the suit of *Henning & Woodruff v. The U. S. Ins. Co.*, and having had notice of the suit, and having participated in the defense of it, is concluded by the judgment in that case, and in this suit the record of the proceedings and judgment may not only be pleaded by way of estoppel, but it is conclusive (unless impeached for fraud and collusion) against the defendant upon the questions involved, to-wit: 1st, whether the United States Insurance Company had a cargo risk for *Henning & Woodruff* in excess of \$60,000, to the extent of \$20,000; and 2d, whether they had become liable on account of the loss of the goods thus insured.

These questions, having both been decided in the affirmative, cannot be tried over again in this suit. The defendants here were in privity with the defendants in that suit, and were virtually parties to it. 1

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Greenleaf's Ev. (7th ed.), §§ 523, 539, 535; *Castle v. Noyes*, 4 Kern. (14 N. Y.) 331, 332; *Beers v. Pinney*, 12 Wend. 359; *Hamilton v. Cutts*, 4 Mass. 353; 1 Stark. Ev. (6th Am. ed.) 220, 221; 2 Phil. Ev. (Cow. & Hill's notes,) 8, 9, notes, 131, n.; *Leather v. Poultney*, 4 Binn. 352, 362; *Littleton v. Richardson*, 34 N. H. 179, 187; *Well v. Nicholds*, 17 Pick. 543; *State to use v. Coste*, 36 Mo. 438; 2 Phil. Ev. 10, 12, 18, 27, 34, 37, 38; *Clark v. Carrington*, 7 Cranch, 321 (2 Curtis, 550); *Kip v. Brigham*, 7 Johns. 173; *Bender v. Fromberger*, in note, 4 Dall. 436; *Walker v. Ferrin*, 4 Vt. 523, 530; *N. Y. Mar. Ins. Co. v. Protec. Ins. Co.*, 1 Sto. C. C. 458, 460; Herman on Estoppels, 44-50, §§ 51-58; Bigelow on Estoppels, 59, 61, 65, 66; *Robbins v. City of Chicago*, 4 Wall. 657-660; on *Lovejoy v. Murray*, 3 id. 18; *Doty v. Brown*, 4 Comst. 73; S. C., 5 Den. 517; *Tarlton v. Tarlton*, 4 Maule & Selw. 20; *Howard v. Mitchell*, 14 Mass. 241; 17 id. 365; *Rapelye v. Prince*, 4 Hill. 123.

II. This is a contract of re-insurance; that is, the defendants have insured the United States Insurance Company to the extent of \$20,000, upon a risk or insurance taken by the United States Insurance Company for Henning & Woodruff. Hence, if the United States Insurance Company was liable, the defendant is also liable. That fact having been once found in a judicial investigation, of which defendants had notice, has become *res adjudicata*, and cannot be re-investigated or disputed by defendants. See authorities above cited, especially *State, etc. v. Coste*, 36 Mo. 438; 46 id. 448; *Phil. Life Ins. Co. v. Am. Life Ins. Co.*, 23 Penn. St. 67; *Doty v. Brown*, 4 Comst. 73; *Com. Ins. Co. v. Globe Mut. Ins. Co.*, 35 Penn. St. 479.

The judgment in the former case was properly pleaded, and it was error to strike it out. Though it might be given in evidence without being pleaded, yet, when pleaded, it operates by way of estoppel, and can only be defeated by showing that it was recovered by fraud or collusion. 2 Phil. Ev. 34-38; *Kilheffer v. Herr*, 17 Serg. & R. 322; 13 id. 246; *Howard v. Mitchell*, 14 Mass. 241; 17 id. 365; *Church v. Leavenworth*, 4 Day, 274.

It is pleaded in the following cases cited above: *Barney v. Dewey*, 13 Johns. 244; *Beers v. Pinney*, 12 Wend. 309; *Kip v. Brigham*, 7 Johns. 167, 173; *Tarleton v. Tarleton*, 4 Maule & Selw. 20; *Robbins v. City of Chicago*, 4 Wall. 657; *Howard v. Mitchell*, 14 Mass. 241.

III. A re-insurer's contract is separate and distinct from that of the first insurer (it does not affect or benefit the first party insured), and he is bound to pay the amount stipulated therein, whether the first insurer pays or not.

The party first insured has no interest in the contract of re-insurance.

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Emerigon, 13, 2, 276, 201, 202; 1 Park Ins. 1, 46 (Ins. Cont. of Indem.); 1 Arnold (Ed. 1849), 2, 268, 288; 2 Park Ins. 595, 596 (an independent contr.); 1 Parsons on Marine Ins. 297-300; *Hastie v. DePeyster*, 3 Cai. 190; *N. Y. State M. Ins. Co. v. Prot. Ins. Co.*, 1 Sto. C. C. 460; *The Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Hone v. Mut. Safety Ins. Co.*, 1 Sandf. (N. Y.) 144.

Glover & Shepley, with *Martin & Lackland*, for respondent. I. The motion to strike out was properly sustained.

1st. There is no privity of contract between the original insured and the re-insurer. In an action against the re-insurer the latter has the right to make the same defenses which could have been made by the insurer. *Yonkers Fire Ins. Co. v. Hoffman*, 6 Robt. 316; *N. Y. Central Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb. 468.

2d. The original insurer is not bound to wait till judgment against him, or until he has paid the claim against him, before suing the re-insurer. *Hone v. M. L.*, 1 Sandf. 137; S. C., 2 Comst. 232; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Herckenrath v. Am. Ins. Co.*, 3 Barb. Ch. 63; *Blackstone v. Allemania*, 4 Daly, 299; *In re Republic Ins. Co.*, 8 Bank. Reg. 197; *Norwood v. Resolute*, 47 How. Pr. 43.

3d. The contract of re-insurance is not a contract of indemnity in any other sense than the contract of insurance is a contract of indemnity. It operates on the property covered by the original contract of insurance, and the interest of the original insurer in the property rests upon his contract of insurance. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359; *Phill. Ins. Co.*, § 498; *Flanders on Ins.* 37; *McKenzie v. Whitworth*, 3 Cent. L. J. 188.

II. The record of judgment was properly excluded. The respondent was not a party to it, nor privy to it. *Rapelye v. Prince*, 4 Hill, 119.

III. The relation which respondent bore to the contract of original insurance was not of such a character as rendered the judgment against the first insurer binding on the re-insurer. The re-insurer was not bound to come in and defend. Notice to the re-insurer of the pendency of the suit did not make the result of the action binding on the re-insurer. He was not a warrantor nor guarantor or surety. The cases cited in 2 *Phill. on Ev.* 9, do not apply to the contract of re-insurance.

IV. The agreement to pay the judgment could possibly discharge the office of notice to the re-insurer; but notice did not make the re-insurer privy to the record. The record is competent evidence against the re-insurer only in an action on the separate and distinct agreement

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offered in evidence. But this action was not founded on the agreement. Therefore, the record was properly excluded.

WAGNER, J. This was an action upon a policy of insurance, brought by the plaintiffs as assignees of the party to whom the policy was issued. It appears from the petition, that in April, 1864, The United States Insurance Company, by its open policy, caused the firm of Henning & Woodruff to be insured, lost or not lost, upon all shipments made to them at and from all ports and places on the Mississippi river and its tributaries, against the perils of the seas, rivers, fires, jettisons, and assailing thieves; that on the 9th of June, 1864, the firm of William Butler & Co., a firm identical with Henning & Woodruff, shipped on the steamer Progress 700 bales of cotton, of the value of \$280,000 at the mouth of Red river, to be delivered at Cairo; and that in the latter part of the same day the cotton was destroyed by fire, which was one of the perils insured against by the United States Insurance Company.

It is further alleged, that on the 1st of November, 1863, the defendant, the Phoenix Insurance Company, issued to the United States Insurance Company a policy of re-insurance, whereby it caused the United States Insurance Company to be insured, lost or not lost, in respect to all cargo risks taken or to be taken of the United States Insurance Company, from any point to any point on the Mississippi river and tributaries below St. Louis, as to any excess of risks over \$60,000, and not exceeding \$80,000; that the risks, against which the defendant thus re-insured the United States Insurance Company were, among other things, those of the seas, rivers and fires. There was an averment of loss by which the defendant became liable for the amount of the re-insurance, and that the fact of such loss was communicated to the defendant.

The petition then contained certain allegations relating to legal proceedings in the Circuit Court of the United States by Henning & Woodruff against the United States Insurance Company, which allegations were as follows: "And the said defendant then and there, to-wit, at St. Louis, on the 18th of July, 1864, did request and counsel the said United States Insurance Company to resist the demand of the said Henning & Woodruff against the said United States Insurance Company in respect of the said cotton so destroyed by fire as aforesaid on board of the said steamer Progress; and thereupon the said United States Insurance Company did resist the demand of the said Henning & Woodruff, and did defend the same, and after a tedious litigation, to which the defendant was from first to last privy, the said Henning & Woodruff, by their surviving partners, Henning & Pearce, did recover against the United States Insurance Com-

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pany, on the 24th of September, 1872, by the judgment of the Circuit Court of the United States, for the district of Missouri, at the September term, 1872, thereof, as well the sum of one hundred and seventy-eight thousand two hundred and eighty dollars for their damages, as their costs in that behalf expended, on account of the loss of the said cotton, so as aforesaid destroyed by fire on the steamboat Progress, on the 9th of June, 1864, all of which will and doth appear by the record of said judgment in said court remaining. And the amount so recovered as damages, as aforesaid, was made up and composed of the principal sum of one hundred and twenty thousand dollars (\$120,000), and interest thereon from the 21st of August, 1864."

The foregoing allegations were by the court stricken out.

After these allegations were stricken out of the petition, the defendant answered, denying all its material averments, admitting, however, the execution and delivery of their own policy of re-insurance. A certain agreement or stipulation was then introduced by the plaintiffs, signed by certain re-insuring companies, the defendant among the number, which that a claim was made upon the United States Insurance Company, under an open policy and agreement of Henning & Woodruff with said insurance company, for the sum of \$120,000 for cotton burned on the steamer Progress, on the Mississippi river, on or about the 9th day of June, A. D., 1864; and as each of the companies, signing the agreement, was bound and liable to the United States Insurance Company to the amount of \$20,000 on cotton for which it was liable, as re-insured to it, to that amount each; and as it was believed both by the United States Insurance Company and the re-insuring companies, that said claim was illegal and unjust, and that they desired that the same should be resisted and defended; they, therefore, for that purpose, in consideration of the premises, agreed with the United States Insurance Company that it should retain and employ such counsel as it might seem proper to consult, and manage the defense, and that in case the United States Insurance Company was successful, and should not be made liable for the claim, then they would each pay their *pro rata* proportion of the attorney's fees and costs; and in case the United States Insurance Company should fail in its defense and be made liable by the judgment of the court, they would each pay their equal *pro rata* proportion of such claim and judgment, and of the attorney's fees and costs. After the submission of this agreement, some parol evidence was heard, and the plaintiffs then offered the record of the suit and judgment in the United States court between Henning & Pearce as plaintiffs, and the United States Insurance Company as defendant. This record was excluded by the court, and the plaintiffs took a nonsuit, which the court refused to set aside.

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From the foregoing statement it will be seen that the material issues in the case involve the action of the court in striking from the pleadings the allegations relating to the record of the suit in the United States court, and in excluding the same record when offered by the plaintiff at the trials. In the first place, the record of the judgment was set up in the petition, and after it was stricken out it was offered in evidence on the trial. The rule is well settled, that where the record is admissible for any purpose, it may be used in either of those modes. It may be inserted in the pleadings, or it may be introduced in evidence with the same effect. The general principle is, that parties only are concluded and bound by a judgment, but the term "parties" is not restricted so as to exclude all who do not appear upon the record; but it includes all who have a direct interest in the subject-matter of the suit, and have a right, and have also had an opportunity to make a defense or control the proceedings. *State v. Coste*, 36 Mo. 438; 1 Greenl. Ev., § 523. The rule may be succinctly stated thus: Where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it. This is the doctrine deduced from the whole current of authorities on this subject. The qualification, however, is, that where it is sought to make the judgment an estoppel, the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner. *Moes Le Blanch v. Wilson*, L. R. 8 Com Pl., 227; 2 Phil. Ev. (4th Am. ed.) 9, note. The rule is so well established, and the authorities are so numerous that it is unnecessary to cite them. One of the latest cases, however, in the highest court of this country, may be noticed. In *Robbins v. The City of Chicago* 4 Wall. 657; S. C., 2 Black, 418, one Woodbury had recovered a judgment for a large sum against the city of Chicago, as damages for personal injuries caused by falling into a hole or an area in the sidewalk, dug or made by Robbins in front of his premises, and by him negligently left unguarded. The city paid the judgment and sued Robbins for the amount so paid. When the Woodbury action was pending, the attorney for the city applied to Robbins to assist him in procuring testimony, and Robbins did so. On the day of the trial, and before the trial was commenced, the same attorney notified Robbins that the cause was about to be tried. On these facts it was held that Robbins was bound by the judgment obtained by Woodbury against the city. It was expressly so held on the principle stated in the opinion that Robbins "knew the suit was pending and could have defended it." In writing the opinion of the court, Mr. Justice CLIFFORD said: "Knowledge

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of the pendency of the suit in the most authentic form was brought home to him (Robbins), and the legal presumption is, that he was answerable over to the corporation, and if so, it must also be presumed that he knew that he had a right to defend the suit."

But there is a question underlying this, and that is, to find and determine in what relation the insured stood to the re-insuring company, the defendant. Mr. Parsons says that, in all cases of re-insurance, whatever may be their ground, the re-insured stands, as to his insurers, in the same relation in which the original insured stands to him. The re-insurers may make the same defenses against him which he could make against the original insured. 1 Pars. Mar. Ins. 299.

The contract of re-insurance is totally distinct from, and unconnected with, the primitive insurance; the original assured having no kind of claim against the re-insurer, and the re-assured remains solely liable on the original insurance, and alone has a claim against the re-insurer. Therefore, where the original insurer becomes bankrupt, and the assured only gets a small dividend out of his estate, the re-insurer is still liable to pay the whole amount of the re-insurance to the assignees of the original insurer without deducting the dividend; and the original assured has no claim upon them in respect of the money so paid. 1 Arnold on Ins., § 119; 3 Kent's Com. 279. It thence follows that there is no privity between the original assured and the re-insurer, and that the liability over of the re-insurer is exclusively and solely to the re-insured.

We cannot find any case where this precise question now presented has ever been determined, but there are cases involving similar principles.

In the case of *The N. Y. St. Mar. Ins. Co. v. Protec. Ins. Co.*, 1 Story, 458, the plaintiffs in the action had insured the brig *Evelina* for a certain voyage, and afterward re-insured in the defendant's corporation. During the voyage insured, the vessel sustained damage by perils insured against, and the owners claimed of the insurers, the plaintiffs, a total loss which they refused to pay; and an action being brought, it was decided that there was a liability for a partial loss only. The plaintiffs then claimed of their re-insurers, the defendants, the amount they were obliged to pay to the owners by reason of the judgment, and also the costs and counsel fees incurred in defending the suit. The defendants, the re-insurers, paid the judgment, but refused to pay the counsel fees and the expenses of the suit; the court held that they were liable and gave judgment for the plaintiffs. Mr. Justice STORY examined the case with his accustomed learning and affluence of argument, and in his opinion, said: "This is a case of re-assurance, and nothing is clearer upon prin-

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ciple and authority than that, in such a case, the re-assurers are entitled to make the same defense, and to take the same objections, which might be asserted by the original insurers, in a suit upon the first policy. The consequence would seem to be, that, as no voluntary payment by the original insurers would be binding or obligatory upon the re-assurers, they are compellable to resist the payment; and to require the proper proofs of loss from the assured in a regular suit against them, so as to protect themselves by a *bona fide* judgment to the amount of the recovery against them, under their re-assurance" * * * "Now, it is precisely in this view, that the consideration of notice of the suit becomes most important, even if it be not (as I am not prepared to say that it is) indispensable. If notice of a suit threatened, or pending upon the original policy, be given to the re-assurers, they have a fair opportunity to exercise an election, whether to contest or admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party re-assured to compromise or settle it, they must be deemed to require that it should be carried on, and then, by just implication, they are held to indemnify the party re-assured against the costs and expenses necessarily and reasonably incurred in defending the suit. If they decline to interfere at all, or are silent, they have no right afterward to insist that the costs and expenses of the suit ought not to be borne by them, as they are exclusively, under such circumstances, incurred for the benefit of the re-assurers, and are indispensable for the protection of the party re-assured."

In *Hastie v. DePeyster*, 3 Cai. 190, it was decided that the re-assurer was liable to the assurer for all costs, *bona fide* expenses, etc., incurred in defending the suit, by the original underwriter, especially when, with notice of its going on, he stood by, and did not offer to settle; for as the re-assurer was entitled to every defense against the insurer which he might urge against the primitive assured, it became necessary for the original underwriter to show he had been obliged to pay on a just claim against him, and he would be entitled to interest on all he had expended and paid.

Now, it seems to me that these cases are not only satisfactory, but that they are conclusive of the question here involved. If a *bona fide* judgment is rendered against the original insurer, and he has contested the matter in good faith for the protection of the re-insurer, and the latter is bound to pay the costs and expenses incurred for his benefit, why is he not equally bound by the judgment? It would be a singular position to take, to say that the re-insurer was bound by the incident and

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not by the principal. The contest is carried on by his consent or acquiescence, and for his benefit and protection, and if good faith is observed, can there be any reason why the identical question should be litigated twice?

The re-assurer and the re-insurer stand in the precise relation of all other parties, where there is a liability over, and the result of one litigation binds or concludes both. There is but one matter in issue which is alike common to both, and that is, whether a loss has occurred, and a debt has accrued to the original insured.

The defense is the same, whether made by the primitive insurer or the re-insurer.

If the insurer fails in his defense, he has his recourse over against the re-insurer. The re-insurer is bound to protect the original insurer to the extent of his policy. Both then are equally alike interested in the determination of the suit. The re-insurer then comes precisely within the rule heretofore laid down, that where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and an opportunity to manage and control it.

There was evidence tending to show that the defendant had notice of the suit brought by Henning & Pearce, as surviving partners of Henning & Woodruff, and there was an allegation in the petition, which was stricken out, that they were privy to that suit, and assisted in its management. The court further excluded the testimony of Mr. Bodley, to show that defendants had due notice, and then ruled out the judgment.

In all this, we think, there was manifest error, and the judgment should be reversed and the cause remanded. Judges NARTON and SHERWOOD concur. Judges VORIES and HOUGH absent.

Judgment reversed.

MATTHEWS V. SKINKER.

(62 Mo. 329.)

National bank — taking security on real estate by, ultra vires.

A national bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined.

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BILL for an injunction to restrain the sale of real estate. The opinion states the case.

Britton A. Hill, for plaintiffs in error.

Noble & Orrick, for defendant in error.

WAGNER, J. The error complained of in this case is the action of the court in rendering a perpetual injunction restraining the trustees from selling the plaintiff's property. From the record it appears that the plaintiff executed her note payable to Sterling Price & Co. for \$15,000, due two years after date, and to secure payment of the note she made a deed of trust, bearing even date with the same, on certain real estate belonging to her. The note and deed of trust were delivered to Sterling Price & Co., who afterward transferred them to the Union National Bank of St. Louis, a banking institution organized under the act of Congress, to secure a loan for \$15,000, advanced to Price & Co. by the bank. Price & Co. having failed to pay the money advanced on the note, and secured by the deed of trust, the trustee, at the request of the bank, advertised the property for sale, and the plaintiff filed her petition to enjoin the trustee and the bank from proceeding with the sale. Whether the deed of trust in the hands of the bank amounted to a valid security, which could be enforced in payment of the money advanced, depends upon the construction of the act of Congress providing for the formation of national banking associations. R. S. (U. S.), p. 998. By section 5136 of the Revised Statutes, authority is given to the banking associations "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion, by loaning money on personal security," etc. By section 5137 it is provided that: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no other: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."

The act, as will be thus seen, gives the association power to loan money

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on personal security, and to purchase, hold and convey real estate in certain specified cases.

The general principles defining the extent and mode of exercise of corporate powers are well settled and have often been passed upon by this court. Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power. *St. Louis v. Russell*, 9 Mo. 507; *Blair v. Perpetual Ins. Co.*, 10 id. 559; *Ruggles v. Collier*, 43 id. 353. They must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them. *Han. & St. Joe R. R. Co. v. Marion Co.*, 36 Mo. 294. The distinction between natural persons and corporations is, that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred on them by their charters. *Bank of Louisville v. Young*, 37 Mo. 398. In *Great Eastern Railway v. Turner*, L. R., 8 Ch. App. 152, Lord Chancellor SELBORNE gave a brief and comprehensive statement of the law applicable to questions of corporate powers. He said: "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently an act which is *ultra vires*, and unauthorized, is not an act of the company, in such a sense, as that the consent of the company to that act can be pleaded." As this case depends upon the interpretation of a national statute we may refer to some of the cases in the United States Supreme Court to see what view that tribunal has taken of the law construing the powers of corporations.

In *The Bank of the U. S. v. Dandridge*, 12 Wheat. 64, the rule is stated to be, that, "whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the construction of the statute itself."

In *Head v. Providence Ins. Co.*, 2 Cranch, 127, Chief Justice MARSHALL defines the powers and limitations of statutory corporations with great clearness, as follows: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it: to derive all its powers from that act and

to be capable of exerting its faculties only in the manner the act authorizes." Judge STRONG, now of the Supreme Court of the United States, in delivering the opinion of the Pennsylvania court, in a case where the national banking law was directly brought in question, said: "The bank is a creature of the act, dependent on it for all its powers, and controlled by all the restrictions which the act imposes." *Venango Nat. Bank v. Taylor*, 56 Penn. St. 15.

In all the cases where questions have been raised respecting the powers and liabilities of national banks, it has been invariably held that the banks have only the powers conferred upon them in the act providing for their formation. That from that act they derive their sole authority, and that they must be strictly governed by it and kept within the line of its limitations. In *Wiley v. The First Nat. Bk. of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122, it was decided, that the taking of special deposits, to keep merely for the accommodation of the depositor, was not within the authorized business of the banks organized under the act of Congress, and that the cashiers of such banks had no power to bind them on any express contract accompanying, or on any implied contract arising out of, such taking. So, in a recent case in Maryland (*Weckler v. The First Nat. Bk. of Hagerstown*, 42 Md. 581; S. C., 20 Am. Rep. 95) it was held that in the act authorizing the incorporation of national banking associations, the kind of banking was limited and defined, and as the act contained no grant of power to engage in bond-brokerage, it was, therefore, prohibited to the banks, and that it was not necessary to the purpose of their existence, or in any sense incidental to the business of banking. It was, accordingly, decided in an action of deceit against a national bank, seeking to recover damages for the alleged fraudulent representations of its tellers made in the sale to the plaintiff of certain railroad bonds, that the business of selling bonds on commission was not within the scope of the powers of national banking associations, and that the bank could not under any circumstances carry it on, and being thus beyond its corporate powers, the defense of *ultra vires* was open to it, and that it was not responsible for any false representations made by its teller by which the plaintiff might have been damaged.

The very question which comes up for adjudication in this case was presented and passed upon in *Fowler v. Scully*, 72 Penn. St. 456; S. C., 13 Am. Rep. 699. In that case Fowler, without any previous indebtedness, gave to the First National Bank of Pittsburgh a mortgage to secure the bank for notes, etc., thereafter to be discounted for him. Upon a proceeding for foreclosure the court decided that lending money by a national bank on mortgage on real-estate security was *ultra vires* and forbidden and the mortgage was declared to be void.

National banks possess just such powers as the act incorporating them gives to them — no more. They are the creatures of the act, and controlled by all its restrictions and limitations. Express power is given to them to “carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of the act.” Banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt, the buying and selling of bills, bullion, and lending of money on personal security. To permit them to loan their money on real-estate security would be destructive of their efficiency and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also hazardous, and have no legitimate connection with the business of banking; they require the employment of outside parties to look after the land and examine titles and are apt to embark the bank into enterprises which sooner or later will end in insolvency. Congress doubtless had these considerations in view when it provided that the money should be loaned on personal security. When the mode of personal security was declared and pointed out, that excluded all others, for the maxim *expressio unius est exclusio alterius* must prevail in this case.

But the intention does not rest merely on the provision requiring personal security on loans. Section 5137 specifies for what purposes national banking associations may purchase, hold and convey real estate, and forbids their dealing in that kind of property for any other purposes. They may purchase and hold so much real estate as may be necessary for their immediate accommodation in the transaction of their business; such as may be mortgaged to them in good faith by way of security for debts previously contracted; such as shall be conveyed to them in satisfaction of debts previously contracted in the course of their dealings, and such as they shall purchase at sale under judgments, decrees or mortgages held by them, or shall purchase to secure debts already due. These are the specified instances, and the only instances, in which it is permissible for national banking associations to purchase or hold real property. Aside from the real estate necessary for the transaction of their business, they can only acquire that description of property to enable them to secure

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themselves for debts previously contracted. But in no case can they loan money on the faith of real-estate security where the debtor was not previously indebted to them. If they do the security taken is *ultra vires* and void, and may be pleaded by the party as a defense against its enforcement.

The case at bar shows that there were no previous dealings between the plaintiff and the bank; the bank loaned the money and took the deed of trust as security. This it had no power to do, and the judgment of the court below will be affirmed.

All the judges concur, except Judge VORIES, who is absent.

Judgment affirmed.

 FIRST NATIONAL BANK OF TRENTON v. GAY, appellant.

(63 Mo. 33.)

Negotiable instrument — condition to pay attorney's fees in promissory note. Ratification. Agency — execution of instrument by agent.

An instrument in the form of an ordinary promissory note contained also a promise "to pay an additional sum of ten per cent as attorney's fee" if the note was not paid at maturity and was placed in the hands of an attorney for collection. *Held*, (1) not a promissory note, and (2) that authority to an agent to make promissory notes in the name of his principal did not authorize the execution of such an instrument.*

If a man's name be signed to a contract without his authority, he may render himself liable on the contract by ratifying it, without a new consideration.

An agent having authority may render his principal liable on an instrument not under seal, by signing his principal's name only, without any indication of agency.

ACTION on instrument in this form :

" \$650.00

TRENTON, Mo., *May* 13, 1874.

" Ninety days after date we promise to pay to the order of Robert L. Gillilan, six hundred and fifty dollars, for value received, with interest after maturity, at the rate of ten per cent per annum, at the First National Bank of Trenton, Mo.; and if not paid at maturity, and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent as attorney's fee.

" NATHAN GILLILAN.

" SAMUEL GAY."

* That such a note was not a negotiable promissory note was also recently held by the Supreme Court of Pennsylvania in *Woods v. North*, ante, 212, note; but see contra, *Gaar v. Louisville Banking Co.*, ante, 209, and *Seaton v. Scoville*, 212, note.

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On the above instrument there was this indorsement : " For value received, I assign the within note to First National Bank of Trenton, Mo., and waive protest, notice of protest, and demand of payment.

" ROBERT L. GILLILAN."

The petition alleged, among other things, that in consequence of the non-payment of the instrument at maturity, it was placed in the hands of an attorney for collection, and asked judgment not only for the principal sum with interest, but also asked for four per cent damages for non-payment, as well as ten per cent damages as an attorney's fee.

In addition to other matters, the defendant, Nathan Gillilan, put in a plea of *non est factum*. A trial was had, resulting in a verdict for plaintiff and judgment accordingly.

These instructions, against the objection of the defendant, were given on behalf of the plaintiff :

1. " If the jury believe, from the evidence, that the defendant Nathan Gillilan authorized or directed Robert Gillilan to get money from plaintiff, and to sign or use his name on a note, or notes, therefor, and that said Robert did, in pursuance of such authority, borrow of plaintiff \$624.80, and, to secure the payment of the same, did make the instrument sued on, signing said Nathan's name thereto as a maker of said instrument, they must find for plaintiff against all the defendants for that sum."

2. " If the jury believe, from the evidence, that defendant Nathan Gillilan authorized or directed Robert L. Gillilan to get money from plaintiff, and to sign or use his name therefor, and that said Robert did, in pursuance of such authority, borrow of plaintiff \$624.80, and, to secure the payment of the same, did make the instrument sued on, signing said Nathan's name thereto as a maker of said instrument, and that said instrument was within the scope and meaning of his authority to use said Nathan's name, then they must find for plaintiff against all the defendants for said sum, and ten per cent thereon as attorneys' fees."

Shanklin, Low & McDougal, for appellants.

Daniel Metcalf, for respondent.

SHERWOOD, J. [After stating the facts as above.] For the reason that the instrument in suit is not precise as to the amount to be paid, we do not regard it as a promissory note. And no little stringency is exhibited by the cases in respect to this point. It is said that " the sum must be stated definitely, and must not be connected with any indefinite or uncertain sum," and that the rule *id certum est*, etc., is not allowed to supply

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any lack in this particular. Thus, where the promise was to pay a certain sum and "all fines according to rule," it was held that the words just quoted could not be rejected as surplusage, and that, consequently, the paper declared on was not a promissory note. *Ayrey v. Fearnside*, 4 Mees. & W. 168. Numerous other instances of like tenor and effect can be found in the books. *Smith v. Nightingale*, 2 Stark. 881; *Bolton v. Dugdale*, 4 B. & Ad. 619; *Smith's Merc. Law*, 258; *Clarke v. Percival*, 2 B. & Ad. 660; 1 *Parsons on Notes and Bills*, 87; *Read v. McNulty*, 12 Rich. Law, 445.

Here, a portion of the amount promised to be paid, to wit: the attorneys' fees, depends upon the contingency, whether another portion, specified by the same paper, is paid on maturity. There are, however, authorities which hold to a different view from the one here enunciated (*Stoneman v. Pyle*, 35 Ind. 103; S. C., 9 Am. Rep. 637; *Nickerson v. Sheldon*, 33 Ill. 373; *Sperry v. Horr*, 32 Iowa, 184), but we regard them as seriously endangering elementary principles and definitions. If, then, our position be correct, that the instrument referred to is not a promissory note, the first instruction given at plaintiff's instance is clearly faulty, in assuming that if Robert Gillilan was authorized by Nathan Gillilan to sign his name to a note or notes, in order to borrow money, therefore this authority would comprehend and authorize the execution of such an instrument as the one declared on. If the father, when stating "that whenever his son wanted accommodation at the bank, he was authorized to use or sign his name," did not by such language intend to confer authority for signing his name to a note or notes as security, it is impossible to give any meaning or force to his utterances. He must have meant to confer such authority if he meant any thing. And it will not be assumed that this language of the father was a mere idle declaration. The law, therefore, will give effect to such evident intention, in the usual and ordinary manner in which such intention is commonly effectuated. The authorities abound in favor of this view. *Story on Agency*, §§ 57, 58, 59, 60, 84, 85, 102, 103; *Elkins v. Macklish*, Ambler, 184.

But while we may freely concede that all means necessary and proper for the accomplishment of the end were intended, yet this concession cannot be permitted to embrace the extraordinary means and measures resorted to by the son, in the present instance. These considerations conspicuously show the exceeding impropriety of giving the instruction above mentioned. The second instruction was equally erroneous as the first. The evidence of the plaintiff's own witnesses, the officers of the bank, shows that the father, in proffering the use of his name, for the accommodation of the son, distinctly stated "that he and Robert were

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both good; that he did not wish to go out of the family for security, that there was no necessity for doing so." This language is susceptible of but one construction. It plainly indicates that while the father was willing to become the surety of his son, he at the same time desired to restrict that suretyship to the members of his family. And he had the undoubted right to so restrict his liability. And, as a necessary sequence therefrom, the son had no power to disregard these restrictions which were imposed on him.

These remarks are but the application of a very familiar doctrine respecting agents who possess only special and limited powers. Thus, an agent authorized to draw and indorse bills in the name of his principal has no power to draw or indorse a bill in his own name, or in the joint name of himself and principal. *Stainback v. Read*, 11 Gratt. 281. A ruling similar to this in point of principle was made in *Mechanics' Bank v. Schaumburg*, 38 Mo. 228. And it matters not whether the addition of the name of Samuel Gay to the note, prior to its delivery, affected the rights or interests of Nathan Gillilan injuriously or otherwise. He has the right to say, when ascertaining that his instructions have not been followed: "I never gave assent to this contract."

The instruction referred to was erroneous, therefore, as already stated, because there was not a particle of evidence tending to show that Nathan Gillilan was willing, at the outset, to assume with Samuel Gay, or indeed any one else, outside of his family, a joint liability in the execution of any paper whatever, much less the instrument in suit. There are other errors in this instruction but we need not point them out, as they have been already passed upon in our remarks upon the first one given. And the errors we have pointed out were not aided or cured by the harmless platitude which the court of its own motion gave, "That, unless the jury find, from the evidence in the case, that Nathan Gillilan authorized Robert L. Gillilan to sign his (Nathan Gillilan's) name to the instrument in suit, the jury must find for the said Nathan Gillilan." But although it may be true that Nathan Gillilan did not give authority to sign his name to the instrument on which the claim of the plaintiff is based, yet it was doubtless in his power, upon full knowledge of what had been done, to give it the sanction of his approbation.

There have been many refinements adopted about this doctrine of ratification; refinements which savor more of subtlety than of sound judgment. With some exceptions, not necessary to be adverted to here, the general proposition is, however, undoubtedly correct, that *he who may authorize in the beginning, may ratify in the end*. This is a common-sense view of the matter, easily understood, constantly acted and relied on, in

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the ordinary occurrences of daily life, and should not be frittered away by subtleties without soundness, and distinctions without difference. And there is, therefore, no force in the point urged on our attention, that there would have to be a new consideration in order to attach validity to a confirmatory act. No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why any thing more should be required on subsequent sanction than on original assent. *Commercial Bank v. Warren*, 15 N. Y. 577, and cases cited.

The Supreme Court of Pennsylvania (*McHugh v. County*, 67 Penn. St. 391 ; S. C., 5 Am. Rep. 445, and cases cited) has, it seems, uniformly held that there could be no ratification without a new consideration, where the original act was *mala fide*. But this court, in the case of *Dow's Ex'rs v. Spurney's Ex'r*, 29 Mo. 386, where the point, indeed, was not expressly raised, but where there was no proof of a new consideration, held that ratification might occur, even where the ratifier's name had been *forged*. There is, however, no proof of bad faith in this case ; so that the Pennsylvania decisions to which we have been cited, even if regarded as sound, would be inapplicable here.

As to the case of *Green v. Shepherd*, 5 Allen, 589, to which our attention is also called, it only decides that, if a note be signed by one as principal, after delivery and acceptance, without new consideration, there could be no recovery against the party so signing. The case of *Good v. Jones*, 9 Mo. 866, has no greater relevancy to the case at bar than the one from Massachusetts, for, in the present case, if the act of the son was ratified, the ratification would not be a collateral undertaking, as in the two cases just cited, but would evidently have relation to the date of the act ratified, take effect from that period, and be regarded as part and parcel of the original promise. But there is no inconsiderable doubt whether the evidence establishes a ratification. The testimony of Carnes, the president of the bank, can hardly be held sufficient for that purpose, especially when taken in connection with that of Nathan Gillilan. Carnes says, that on one occasion Nathan Gillilan walked with him to the depot and stated, " that they had received some notices of notes falling due at the bank, and requested me to tell the cashier that he or Robert L. would be over in a few days and fix them up." But at that time Gillilan had a note in bank, signed by himself, for money which he had borrowed and afterward paid. This note bore the names also of Robert L. and George Gillilan ; and Nathan Gillilan may have referred to *that*. Besides, he testifies that he never received any notice from the bank of the existence of any note except his own, and did not know of

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any other note in bank but his own (until after Robert L.'s arrest); that he remembered the conversation with Carnes well, and that conversation was as follows: "I told him I owed a note in bank, had received notice of the maturity thereof, and requested him to tell the cashier I would be over in a few days and pay it, which I did."

Under these circumstances we should feel somewhat disinclined to hold that the rule as to full knowledge on the part of the ratifier had met with compliance in the case before us. *German Bank v. Dunn*, 62 Mo. 79; *Owings v. Hull*, 9 Pet. 607; *Nixon v. Palmer*, 8 N. Y. 398; *Fletcher v. Dysart*, 9 B. Monr. 413. We make, however, no express ruling on the sufficiency of the evidence with respect to ratification.

All of the instructions asked by defendant were refused; and we have incidentally commented on them in the foregoing remarks. They were, in the main, correct.

It has been strenuously insisted here, as it was below, when the instrument sued on was offered in evidence, that the name of Robert L. Gillilan, in order to be sufficient to bind his father, should have appeared on the face of the paper as agent of the latter. But this may well be doubted. Mr. Parsons in his work on Notes and Bills (Vol. 1, pp. 91, 92), holds that, notwithstanding there are grave objections to an agent signing the name of the principal without adding appropriate words showing that he did act as agent, yet such a mode of execution would be valid. And he cites several cases in support of this view. Thus, in *Watkins v. Vince*, 2 Stark. 324, Lord ELLENBOROUGH held such a signing by a son sufficient, where the son had done this in several instances. A similar ruling was made in *Neal v. Erving*, 1 Esp. 61. The case of *Wood v. Goodridge*, 6 Cush. 117, relied on by defendant's counsel, holds differently, but the remarks there were principally applicable to the formal execution of a mortgage by an attorney in fact. The language, however, has a wider significance; but the case shows that these utterances were mere *dicta*, totally unnecessary to a decision; nor was the decision placed on that ground, but upon the ground that the attorney was not authorized by the instrument under which he professed to act, *to make either a note or a mortgage*. In addition to that, four years after the above case was decided, the Supreme Court of Massachusetts expressly held, in *Brigham v. Peters*, 1 Gray, 129, that a principal might be found by permitting his agent to use his name and signature; and the cases in *Espinasse* and *Starkie*, *supra*, are cited with approval. See, also, *Forsyth v. Day*, 41 Me. 382, where the doctrine of 6 Cush., *supra*, is denied, both on reason and authority; Story on Agency, § 148; *Hefner v. Vandolah*, 62 Ill. 483; 1 Daniel in Neg. Instr., § 299, and cases cited; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 327

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There are other points to which our attention has been called by the ingenuity and research of counsel, but we have, for the present at least, sufficiently passed on all the salient and decisive points involved in this record.

The result is, that the judgment must be reversed, and the cause remanded; Judge VORIES absent, the other judges concur.

Judgment reversed.

ELLIS, plaintiff in error, v. KANSAS CITY, ETC., RAILROAD COMPANY.

(63 Mo. 181.)

Nuisance — action for. Parties — husband and wife.

A nuisance was created near a house whereby the house was made unwholesome and the tenant's wife sick. *Held*, that although the tenant had a right of action therefor and could recover damages for the injury to his wife's health, yet such action accrued to him solely as occupier of the house, and, therefore, that after his death the wife could maintain no action.

ACTION for damages occasioned by a nuisance. The opinion states the case.

F. M. Black, with *Ohas. I. Thomson*, for plaintiff in error. For injuries to the wife, two causes of action accrue, one to the wife, for personal injuries and physical suffering that she has sustained, and the other to her husband, for expenses and loss of services incurred by reason of the injuries. In the former the husband is joined as a nominal party only, if living. *Smith v. City of St. Joseph*, 55 Mo. 456. On the death of the husband, the cause of action in favor of the wife survives to her. *Johnson v. Dickens*, 25 Mo. 588. This is an action for damages arising from injuries to the health of plaintiff. *Vanderburgh v. Truax*, 4 Den. 464; *Rigby v. Hewitt*, 5 Exch. 248; *People v. Corporation of Albany*, 11 Wend. 539. Injuries to health, occasioned by an infected atmosphere or otherwise, are placed in the same category with injuries to the body or limbs, and are equally actionable. 3 Chit. Bl. Com., marg. pp. 119, 123.

This being an action for injuries to the person, and not to the property, it is unnecessary to determine whether they belong to the class of public or private nuisances, as defined by the common law. When the result of the nuisance is special damage, such as injury to the health, the party

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suffering the injury has an action for damages, whether the nuisance be such as is termed public or private. *Story v. Hammond*, 4 Ohio, 876; *Welton v. Martin*, 7 Mo. 807; *Lansing v. Smith*, 4 Wend. 9; *Smith v. McConathy*, 11 Mo. 517; *Ray v. Sellers*, 1 Duv. (Ky.) 254.

The second and third instructions given for the defendant seem to have proceeded on the theory that the cause of action was for damages to realty, instead of personal injuries to the wife.

B. F. Stringfellow, for defendant in error.

NORTON, J. This was an action brought by plaintiff in the special law and equity court of Jackson county, to recover damages for a nuisance. It is alleged in the petition that the plaintiff and her husband and their children were living in a certain house in Platte county, of which her husband had the possession, situated about forty yards from the railroad track of defendant; that during their occupancy of said house the defendant, by their locomotive, ran against and killed a horse, directly opposite the house occupied by plaintiff, and permitted the same to remain on the side of their railroad track for about two weeks, during which time, by the decomposition of the carcass, the surrounding atmosphere became so noxious and offensive as to render the house occupied by the plaintiff unwholesome, and caused her to become seriously sick. The answer denies all the material allegations of the petition.

Upon the trial of the cause plaintiff offered evidence which tended to prove that in July, 1872, defendant, by its engine, killed a horse opposite to the house in which plaintiff, with her husband and family, lived, and about forty yards therefrom; that the carcass was permitted to lie on the side of the track of defendant's road, unburied, for about eight days, during which time it became so offensive as to render the occupancy of the house unwholesome, and caused sickness to the occupants thereof; that plaintiff, during the continuance of the nuisance, suffered from headache and nausea, and that in September following she was taken bed-fast and lay in bed some weeks; that plaintiff's husband died the 31st of October, 1872, of some disease of the lungs.

Defendant offered evidence tending to show that before the horse was killed plaintiff's husband was suffering from a disease of the lungs, and also the evidence of a physician, who testified that he had devoted himself to the study of the effects of animal decomposition; had heard the evidence of plaintiff; that from the symptoms described by her, her sickness was not produced by the effects of animal decomposition, but was of a malarial character, irregular remittent or intermittent fever.

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The plaintiff asked six instructions, all of which were refused by the court, to which plaintiff excepted. The court gave three instructions for defendant, and to the giving of the second and third of them plaintiff excepted, and thereupon took a nonsuit, with leave to move to set the same aside. A motion for that purpose was filed and overruled, to which plaintiff excepted, and brings the case here for review by writ of error.

The court refused the following instructions asked for by plaintiff :

“ If the jury believe, from the evidence, that plaintiff and her husband were, in the months of July and August, 1872, living and residing in the house some thirty or forty yards from the line of defendant's railroad track ; that said husband deceased before the commencement of this suit ; that in the month of July, 1872, the defendant, by its cars or engines, ran over and killed a certain horse at or near said house, and that defendant permitted said horse to lie where thrown on the side of the track in the sun, and there decompose ; that thereby the surrounding atmosphere and said house were filled with stench and unwholesome smells and odors, and that by reason thereof the plaintiff was rendered sick and received injuries to her health, or her health was thereby impaired, then you will find for plaintiff, and the measure of damages will be the amount of damages she sustained to her health.”

As the other five instructions asked for by the plaintiff and refused by the court contain substantially the same principle embodied in the one copied herein, it is unnecessary to notice them further.

The following instructions were given on the part of defendant :

1. “ The jury are instructed that this action is not for the recovery of damages arising from a public nuisance, but is for the recovery of damages alleged to have been occasioned by a private nuisance committed by defendant.”

2. “ Plaintiff cannot recover for any of the grievances set out in the petition, unless the jury find, from the evidence, that the plaintiff was, at the time of the commission of such grievances, in possession of the house and land mentioned in the petition as occupied by plaintiff.”

3. “ There is no such possession of said house or land by plaintiff as will entitle her to recover any damages in this action ”

The first instruction given for defendant appears to have been given without exceptions, and the court in giving it rightly applied the law to the facts of the case. A nuisance is any thing “ which worketh hurt, inconvenience or damage.” They are either public or private. A nuisance is public when it annoys all the members of a community, and private when it injuriously affects the lands, tenements or hereditaments of an individual. 3 Bl. Com. 215.

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Nuisances in one's dwelling are all acts done by another from without, which render life within the house uncomfortable, whether it be by infecting the air with noisome smells or with gases injurious to health. 2 Greenleaf's Ev., § 466.

The defendant, in permitting the horse killed by its locomotive to remain on the side of the track, so near the house occupied by plaintiff and her husband as to render her occupancy unwholesome, was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house. The right of action in this case was in the husband of plaintiff, he being the occupier and in the rightful possession of the house with his family, by contract with the owner of the property. Had the husband brought this suit it could have been maintained, and on the trial he would have been permitted not only to show the sickness of himself, but also the sickness of his wife, his family, and the different members thereof, as a measure for the recovery of damages. *Story v. Hammond*, 4 Ohio, 376; *Kearney v. Farrell*, 28 Conn. 317.

It is urged by plaintiff's counsel that the right of action, for injuries resulting from the nuisance, survived to the wife after the death of the husband, and, therefore, the court erred in refusing plaintiff's instructions and in giving instructions two and three for defendant, and rely upon the cases of *Smith v. The City of St. Joseph*, 55 Mo. 456; S. C., 17 Am. Rep. 660, and *Johnson v. Dickson*, 25 Mo. 583, to sustain their view.

In the case of *Smith v. City of St. Joseph*, which was a suit brought by plaintiff to recover for the loss of the services of his wife, and the expenses incurred by him for nurse hire and doctors' bills, in consequence of an alleged injury to her occasioned by defendant's neglect, the court simply decided that an action was maintainable, notwithstanding a former suit had been brought against the defendant by the husband and wife, to recover damages for the personal injuries and physical suffering of the wife, occasioned by the same neglect of defendant.

We cannot see how the well-considered views of that opinion can be applied to this case. In that case it was asserted that the husband could not maintain an action for personal injuries and physical suffering of the wife, without making her a party, the meritorious cause of action being in her. In the case we are called upon to consider, the cause of action accrued to the occupier or tenant of the property affected by the nuisance complained of, and in a suit for damages occasioned thereby, he can recover for damages to the members of his family, without making them parties. We have not been able to find any authority which would authorize us to declare that each member of the family of the occupant of a house affected by a private nuisance could maintain an action therefor,

which would follow if the views contended for by plaintiff are correct. In an action to recover damages for a nuisance of the character complained of, the plaintiff must prove possession of the house, the injurious act complained of, and the damages resulting therefrom. 2 Greenleaf's Ev., § 470.

The second instruction given for defendant, requiring the jury to find, that before plaintiff could recover she must show that she was in possession of the house affected by the nuisance, was in accordance with the principles above laid down ; and as the evidence showed that the premises at the time of the alleged grievance were in the possession of the husband of plaintiff, the third instruction for defendant was properly given.

The judgment is affirmed ; the other judges concur.

Judgment affirmed.

STATE v. POTTER.

(63 Mo. 212.)

Bond — conditional execution — delivery in violation of condition.

Defendant executed a bond as surety and left it with the principal obligor, with the understanding that it should not be delivered until another person had executed it as co-surety ; but the principal delivered it without the signature of such other person. The bond was complete on its face and the obligee had no notice of the understanding between the principal and surety. *Held*, that the defendant was liable.

ACTION by the State to the use of one Bothrick, guardian and curator, upon a bond given by James M. Turley as principal and the defendant Potter and another as sureties. Potter set up the defense that he signed the bond with the understanding and on the condition that the bond should also be signed by Bothrick as surety, and that Turley agreed not to file the bond until Bothrick had signed it.

Vest & Gantt, for plaintiff in error.

Snoddy & Bridges, for defendant in error.

SHERWOOD, J. We are to determine : Whether a curator's bond, regular in form, can be avoided at the instance of a surety, upon the ground that he had signed it under a conditional agreement, made at the

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time with the principal, that the latter was not to deliver the bond until the signature of a certain person had also been obtained, and that notwithstanding such agreement and in violation of it the bond was delivered.

The question has been one prolific of litigation, and the conclusions reached by different tribunals have frequently exhibited no inconsiderable lack of uniformity. But it is thought that many decisions, which at first blush appear incapable of being harmonized, will be found, on more narrow examination of the controlling facts incident to each, to bear a closer resemblance than casual observance would, at the outset, lead us to suppose. In intimate connection with the subject under discussion, we are asked to review some of our former decisions in order that it may be ascertained whether they will bear the test of a closer and more deliberate examination than hitherto bestowed — an examination commensurate both with the importance of the topic involved and with the greater facilities now afforded for such investigation, in consequence of recent and elaborate adjudications, some of which were not accessible, or else were overlooked, at the time our own, now sought to be re-examined, were rendered.

In the case of *The State v. Sandusky*, 46 Mo. 377, the point in hand was not involved. There were neither the proper averments in the answer, in respect of a conditional delivery of the bond, nor if there had been such averments, was there any evidence adduced which could have been offered in their support; “the only real defense” was a denial by the defendant of his signature. Any remarks, therefore, in that case, relative to the matter now before us, cannot be held as possessing authoritative value. And the same may be said of *Cutter v. Whittemore*, 10 Mass. 442, referred to in the case just cited. So far as *Gasconade County v. Sanders*, 49 Mo. 192, has relevancy to the present case, it is an authority favoring the position of the beneficiaries in this action; for the point is there conceded in argument that, “when the principal in a bond, or other person not acting as the agent of the creditor, fraudulently procures the names of sureties to a bond, and the creditor takes the bond and loans his money, without any knowledge of the fraud practiced on the sureties, he cannot be made to suffer by such fraud. Their remedy is against the party who defrauded them, and not against the creditor;” and the judgment of the trial court was reversed, because of failure to recognize the validity of the defense that the defendant’s signature was procured by fraud and forgery of the agent of the county.

Lynn County and State, etc., v. Farris, 52 Mo. 75; S. C., 14 Am. Rep. 389, gives full recognition to the doctrine of the conditional delivery of a bond by one co-obligor to another, and of the invalidity of such

delivery when violative of previously imposed conditions. From the meager statements it does not appear whether or not the officer who received the bond was cognizant of the facts afterward relied on as a defense. There, however, the name of one of the apparent sureties was forged; but in the line of remark pursued in the opinion, no particular stress is laid on the forgery, only so far as its existence showed a failure of compliance with antecedent requirements; and the decision is altogether based on the idea, that in consequence of the terms imposed by the surety not having met with performance, no valid execution of the bond had occurred, although, curiously enough, a remark of similar import to that already quoted from *Gasconade County v. Saunders*, is indulged in. Now, if these episodal observations assert the true rule in relation to the rights of an ordinary creditor, who is not aware of, nor a participant in the fraud practiced by the principal on his surety, would it not seem to follow that a like rule should prevail where, under similar circumstances, the officer appointed for that purpose is the recipient of either an official bond, or of one for the direct payment of money? May it not be asked with much pertinence, wherein the attitude of the county or State differs from that of a private individual in this regard, and may not those who assert the existence of an altitudinal difference in this respect, be called on to establish by something more than mere assertion, why the creditor should not "be made to suffer by such fraud," on the one hand, while the county or State is "made to suffer, on the other?"

In *Ayres v. Milroy*, 53 Mo. 516; S. C., 14 Am. Rep. 465, a division of opinion occurred as to the method pursued in the discussion of that case, the majority opinion proceeding on the theory of conditional delivery to a co-obligor, while that of the minority concurs in the result upon the peculiar facts. There the suit was on a non-negotiable note, signed by the surety on the express condition, which was not complied with by the principal, that he would obtain the signature of another surety before delivering the note to the creditor. And it was held that these facts constituted a valid defense, and that the same rule was applicable to all instruments non-negotiable, whether notes or bonds. The conclusion reached was a correct one, whatever may be thought of the reasons on which it was based, for it was conceded throughout the whole case that the plaintiff was apprised of the condition on which the surety was to be bound. Knowing this, the plaintiff acted in bad faith in his acceptance of the note, and, therefore, should have been denied a recovery on that ground alone, regardless of other considerations; and this last ground was the one which induced the concurrence of those who, disapproving of the reasoning employed, joined in the approval of the result. In

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both of the two preceding decisions it will be observed that the sole basis of the ruling is a lack of power in the co-obligor to make the delivery of the instrument in question. Other authorities relied on by defendant as sustaining the action of the court below will now be noticed, including those on which the cases just cited were based.

Pawling v. United States, 4 Cr. 219, is to the effect that, if a surety signs an official bond, and delivers it to his principal, on condition that others, whose names were inserted in the body of the bond, should also sign it, this delivery of the bond only made it an escrow, and if the requisite signatures were not obtained, that the surety was not bound.

In *Duncan v. United States*, 7 Pet. 435, the bond also lacked completeness in a similar manner. It does not appear whether there was any defect or irregularity in the bond in suit in the case of the *United States v. Leffler*, 11 Pet. 86, and the only point considered was, as to the competency of certain witnesses respecting the conditional execution of the bond. The circumstances under which the evidence was held competent are not set forth; and in all probability the facts were like those of *Pawling v. United States*, *supra*, and it was controlled by that decision.

Seely v. People, 27 Ill. 173, holds that where a party signs his name to a bond as co-surety with another, and such other's signature had been forged, the surety, supposing the signature to be genuine, will not be liable, but the case also, *arguendo*, condemns in pointed terms the doctrine which it is cited as upholding, and evidently proceeds upon the theory that to the surety not the slightest negligence was attributable.

In *Leaf v. Gibbs*, 4 C. & P. 466, the surety was to sign upon condition that his mother should do the same, but she refused, and as the plaintiffs were informed of the terms on which the son's signature was obtained, he was held not liable, unless, knowing the facts, he had waived the objection.

Perry v. Patterson, 5 Humph. 133, was in its salient features similar to the one just mentioned. A compromise was effected between a debtor and the attorney of his creditor, whereby it was agreed that two sureties should sign a note with the debtor, and that this note, when signed by sureties who were named and agreed to be received, should be accepted, and operate as a stay for twelve months of the judgment, for the amount of which the note was to be given. A blank note was accordingly prepared with three seals, which was signed by one of the sureties, on condition that the other intended surety should sign also. This the latter refused, but the attorney to whom the note had been delivered by the principal never received the note in payment of the judgment, as he still insisted on having the two sureties, as per agreement. And besides,

the note was not delivered to the attorney in execution of the agreement, "but merely lodged with him, till such time as the surety could be induced to sign it." So that the note was incomplete; it was never delivered; and the attorney with whom it was "merely lodged" knew all about the attending facts. The head-note of this decision is inaccurate and well calculated to mislead; there was no "ignorance of the creditor" of the circumstances, unless the knowledge of the attorney is to be deemed the ignorance of his employer. The remarks, therefore, as to the effect of the creditor's ignorance are wholly outside of the case, since the proof shows nothing of the sort.

Carter v. Mc Clintock, 29 Mo. 464, simply declares that no delivery of a note occurs where the payee surreptitiously obtains possession thereof, and that he cannot maintain an action thereon.

Pidcock v. Bishop, 3 Barn. & Cres. 605, holds merely that where a creditor and his debtor have made a secret arrangement which, without the knowledge of the surety, increased his responsibility, this was a fraudulent concealment, of which the creditor could not take advantage, and accomplished the surety's exoneration.

The gist of the decision in *Lloyd v. Howard*, 1 Eng. L. & Eq. 227, is, that if a bill of exchange be delivered by A to B for a specific purpose, which the latter does not accomplish, but retains the bill till overdue, and then delivers it to C without value, C is not a *bona fide* holder, and cannot maintain an action against A as an indorser. *Palmer v. Richards*, in the same volume, 529, was based on a different state of facts. The bill was indorsed by A in order to have it discounted and delivered to B for that purpose, who applied it to his own purposes, by depositing it prior to maturity as a security for money advanced, and held that the indorsement of A bound him.

Aude v. Dixon, 5 Eng. L. & Eq. 512, seems to establish that if a blank in a negotiable note be (contrary to a previous stipulation with a surety, another surety shall sign, before delivery,) filled with the name of the party as payee who advances the money on it, the surety is not bound. The note there, however, would appear to have been incomplete, as a blank space was left where the intended surety was to sign. But if this circumstance was not taken into account, the decision is clearly contrary to the decisions of this court, and of other American tribunals. 1 Parsons on Notes and Bills, 111, and cases cited.

10 Jur. (N. S.) is not accessible, but if we may rely on a report of the case of *Swan v. N. B. Australasian Co.*, id. 102, the facts were substantially these: A was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of

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shares different from those of the company intended by A, being shares in the defendant's company, and by means of a duplicate key, which he had procured to be made without the knowledge of A, obtained certificates from a box of A's necessary to perfect the transfers and also forged the names of the attesting witnesses, and it was held, in an action against the company for damages, and for a mandamus to restore the plaintiff's name to the registry, that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery.

In short, the ruling goes only so far as to assert that the combined acts of larceny and forgery on the part of the agent did not estop the plaintiff from the assertions of his rights ; and it would have been strange, indeed, had the ruling been otherwise, since it is plain to see that merely trusting blank forms of transfer to the agent did not enable him to perpetrate a fraud upon a third party, but in addition thereto it required a contemporaneous conjunction of two crimes in order to the fraud's consummation.

In *Preston v. Hull*, 23 Gratt. 600 ; S. C., 14 Am. Rep. 153, the bond was incomplete on its face, lacking the name of the payee, and the single point decided was that parol authority would not authorize any one to fill the blank thus left in the absence of the principal.

Johnson v. Baker, 4 B. & Ald. 440, shows the instrument — a composition deed — to have been incomplete when delivered to one of the creditors to procure the signatures of the others therein named.

Fletcher v. Austin, 11 Vt. 447, discusses the point of delivery, but there the bond displayed its own incompleteness in the lack of signatures corresponding with the names inserted in its body, and there the court expressly says : " If a bond contains the names of other obligors, and is delivered without the signatures of all, the obligee must inquire whether those who have signed, consent to its being delivered without the signatures of others." Now, if the duty of inquiry on the part of the obligee has its origin in palpable omissions in the bond, would it not seem to follow with conclusiveness, that no inquiry is required where no defect exists ?

The bond mentioned in *State Bank v. Evans*, 3 Greene (N. J.), 155, was incomplete, in that it lacked the signature of Olden, one of the named obligors.

In *Lovett v. Adams*, 3 Wend. 380, the only point in judgment was the propriety of the rejection of two co-obligors as witnesses ; but the occasion was improved to the discussion of other points. Besides, the report of the case clearly shows that nine sureties signed a bond for the payment of a certain sum of money, and sent the bond to be delivered

to the plaintiff on condition that previously arranged terms were complied with, whereby such sureties would be indemnified against the risks incident to their suretyship. The plaintiffs refused acceptance of these terms, and subsequently, by a new and different arrangement, entered into with five of the obligors (without the knowledge or consent of the remaining four) accepted the bond and then brought suit, not against the five who had not, but against the four who had not, consented to such an arrangement.

In *Bronson v. Noyes*, 7 Wend. 188, the sheriff, the recipient of the bond, was cognizant of the conditions upon which the surety signed, and in effect promised that those conditions should either meet with the compliance or else other bail should be procured.

In *Herdman v. Bratten*, 2 Harr. 896, the bond was plainly incomplete. That case was decided, however, on another point — the alteration of the bond by the erasure of certain names which were in the bond, at the time the signing in question occurred; and, moreover, the sheriff, to whom the replevin bond was executed, was apprised of the express condition on which the surety signed, and afterward, it seems, erased the names of those whose signatures he was to procure.

In *Bibb v. Reid*, 8 Ala. 88, the administration bond was lacking in nothing, and it was held that it was capable of delivery to a co-obligor as an *escrow*, and was invalid unless on performance of conditions; and some of the same authorities already examined were cited in support of the position.

The People v. Bostwick, 32 N. Y. 445, is based on a portion of the authorities heretofore noticed. There was no infirmity patent on the face of the bond, and the case was discussed on the theory both of the delivery of the bond to a co-obligor as an *escrow*, to await the fulfillment of prior requirements, and on that of estoppel, and the conclusion reached favoring the former view and relying on it, and opposed to the latter.

A result diametrically opposite to the one just announced, has been reached in Indiana, in which, after an exhaustive examination and discussion of the authorities, it is held not only that one surety is incapable of delivering a bond or other instrument of like nature to his co-obligor, as an *escrow*, but that the surety was bound regardless of the giving or disobedience of secret instructions, if the instrument was perfect on its face, and the co-obligor clothed thereby with apparent authority to deliver it. And the case of *Pepper v. State*, 22 Ind. 399, has been expressly overruled in *State v. Pepper*, 31 Ind. 76, when the cause came the second time before the Supreme Court. Similar rulings had been also made in *Dear-dorff v. Foresman*, 24 Ind. 481; *Blackwell v. State*, 26 id. 204; and *Webb v. Baird*, 27 id. 368.

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Bagot v. State, 33 Ind. 262, does not militate against these rulings, though the case is very loosely and obscurely reported, and a great deal of unnecessary matter introduced. The substance of the case and of the point in judgment is this: that parol authority is insufficient to authorize one having no connection with an official bond to sign the name of a third person to such bond, unless the signing take place in the presence of him giving the verbal authority. The opinion was delivered by FRASER, J., who was on the bench with RAY and GREGORY, JJ., when all the cases subsequent to *Pepper v. State* were decided, and who had delivered an emphatic opinion on petition for rehearing in *State v. Pepper*, in which he explicitly concurred with his associates in upholding the doctrine announced by them in 24, 26, and 27 Ind., *supra*, and who were still his associates when *Bagot v. State* was decided. Under these circumstances, the assumption is a very bold one, that the judge who delivered the decision in the case last cited, or those who concurred with him therein, intended to announce any doctrine variant from their prior conclusions. The rule thus enunciated is this, "that where the surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority; and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety."

And, to use the language of FRASER, J., in delivering the opinion of the court on motion for re-argument in *State v. Pepper*, "the subject had been examined by all the judges in consultation as to the extent of a critical inspection (to a considerable extent repeated) of the cases cited, and of those referred to by all other courts as supporting the ruling of this court in this cause when formerly here. The result has been, not only a clear conviction on the part of the whole bench, as expressed in the opinion in this and the Deardorff case, but also a wonder how, upon a thorough examination of the subject, any other conclusion could be arrived at."

It has doubtless been observed, that in nearly all the cases relied on by defendant, of which I have given the gist, the judicial utterances were mere *obiter dicta*, or else there was something apparent on the face of the bond evincing incompleteness, or some attendant circumstances showing knowledge or its equivalent, on the part of the recipient of the bond, or other instrument, that its delivery was not to occur, except other signatures were first obtained, or other antecedent acts done of equal importance.

This is true of every case instanced from other States, except that of *People v. Bostwick*, and *Bibb v. Reid*, *supra*, the latter of which discusses only, and very briefly, the question of conditional delivery by one co-obligor to another; and that is the ground whereon the decision in *People v. Bostwick* is chiefly based; and our own adjudications, as above seen, are exclusively based on that ground.

Did we care to press the point, it might not, perhaps, in a manner at all consonant with rudimentary definitions, be easy to explain how an instrument could be deemed an *escrow* unless delivered as such to a third person; nor how, if an *escrow*, it could be incomplete. But we are content to waive the point, since it is not plainly necessary to the proper disposal of this case, being desirous of placing that case on broader grounds than those incident to a narrow technicality.

An estoppel *in pais* is said to arise when an act is done or statement made by a party, which cannot be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission. *Lickbarrow v. Mason*, 2 T. R. 63, 70. Here the surety who defends this action had invested the principal with an apparent authority to deliver the bond; and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it, that there was any secret agreement which should preclude the acceptance of the bond. And the surety is alone in fault in the matter, as but for this unwarranted trust in Turley, the latter would never have had it in his power to occasion the loss which the beneficiaries of this bond must suffer, if the defense made by the surety is successful.

Surely then a more opportune application of the language of Lord HOLT in *Hern v. Nichols*, 1 Salk. 289, could not occur, than to the case before us, that "seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver, should be a loser than a stranger."

If the doctrine of estoppel would not apply here, might not the significant query well be asked, in what state of facts would it apply?

Now, the rule is well settled, that if I stand by, and, without objection, see another dispose of my property, I cannot be afterward heard to assert ownership in it; and this, in accordance with the maxim: "That he who did not speak when he should have spoken, shall not be heard, now that he should be silent."

In such instances the question of power to make the sale and pass the title is one not worthy of a moment's consideration. The only proper inquiry is: Did I, by my silence, give the purchaser reason to infer that his vendor had the right to dispose of the property? If so, then, upon

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every principle of fair dealing, the true basis of such estoppel, I am estopped to assert any thing to the contrary of what my silence might naturally be inferred to indicate, and the hypothetical case is by no means stronger than the real one under discussion. For the officer to whom was committed the duty of taking the bond had literally conformed to that duty, by the acceptance of an instrument perfect in every particular, and emanating from the proper custody ; and he had, therefore, the right to infer, and it was the defendant's conduct which gave origin to this reasonable inference, that the delivery of the bond was in conformity to the usual course of such transactions.

A stronger case of estoppel could not well be conceived than this, where a surety, after standing by for years, and allowing the patrimony of orphans to be squandered, now steps in at this late day, and asserts that, owing to a hitherto undisclosed arrangement, he, although apparently bound for any default of his principal, was not in fact bound.

This subject of estoppels, and under what circumstances they arise, considered with reference to bonds, has recently undergone discussion in the national Supreme Court, and the same result has been reached as above, and the ruling made in *Pawling v. United States*, which is the basis of all subsequent kindred decisions in this country, is explained on grounds entirely satisfactory, and similar to those already adverted to. *Dair v. United States*, 16 Wall. 1.

To the same effect are exhaustive and elaborate discussions in Virginia and Maine. *State v. Peck*, 53 Me. 284 ; *Nash v. Fugate*, 24 Gratt. 202 ; S. C., 18 Am. Rep. 640.

But there are other elements which also enter into a proper consideration of this cause, and which, on that account, should not be ignored. Are not sureties sufficiently solicitous about escaping from what they regarded, when signing, as remotely contingent possibilities, without opening new avenues to facilitate their eager escape ?

And would it not be acting in flagrant violation of one of the most familiar rules of evidence, and of the very spirit of the law itself, to permit formally executed securities to be annulled by testimony of some contemporaneous parol agreement ? If, under ordinary circumstances, such testimony would be objectionable, would it not be doubly obnoxious in cases like this one, where the agreement is kept sedulously concealed from the other contracting party ?

But one answer — an emphatic affirmative — can be returned to these questions.

Again, it concerns the State, that the heritage of the helpless, confided to the protection of her courts, should not suffer detriment. The conse-

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quences would be fraught with disaster, and it would be subversive of the plainest dictates of public policy if sureties were permitted, by means of some "ill-remembered conversation," or some occult understanding, never disclosed but under the shadow of impending loss, to escape liabilities which their own solemn deed and recorded specialty announces them to have incurred.

These reasons appear to us conclusive that the following declaration of law asked by plaintiff should have been given :

" Although the court may believe from the evidence that the defendant, Jabez H. Potter, may, at the time of his signing the bond sued on, have had the agreement with James M. Turley, the principal in said bond, that said Turley was not to file said bond, or deliver the same, until Wm. E. Bothwick also executed said bond as surety ; yet if said bond was afterward, in violation of said agreement, filed by said Turley in the County Court of Pettis county, Missouri, and was approved by said court, and said bond was, when so filed and approved, complete and regular upon its face, and the officers of said court had no notice of said agreement between said Turley and said Potter, then such agreement constitutes no defense to this suit, and the court must find for the plaintiff," and that the one of a contrary effect should have been refused. In so far as our former decisions are in opposition to this view they are overruled.

Judgment reversed and cause remanded.

Judges NAPTON and HOUGH concur. Judge WAGNER absent.

Judgment reversed.

CASES
IN THE
S U P R E M E C O U R T
OF
NORTH CAROLINA.

HILL v. BOARD OF ALDERMEN OF CHARLOTTE, appellant.

(72 N. C. 55.)

Municipal corporation — limit of liability.

A municipal corporation, having power under its charter to make ordinances for the safety of property in the city, suspended for a short time the operation of an ordinance forbidding the use of fire-works within the city. During such time plaintiff's building was set on fire and destroyed by fire-works negligently used by boys. *Held*, that the corporation was not liable for such destruction. (*See note, p. 458.*)

A PPEAL by defendant from a judgment of the Superior Court of Mecklenburg county overruling a demurrer to the complaint. The facts fully appear in the opinion.

Jones & Johnson, for appellants.

Wilson & Son and Brown, for respondent.

RODMAN, J. The complaint alleges that the defendant is a corporation authorized "to make all ordinances, rules and regulations for the good government, health and safety of the property and persons in said city, not inconsistent with the laws of the State or of the United States, and to impose penalties for the breaking or infringement of any laws or ordinances by them established." That in pursuance of this authority the authorities of the city in 1871 adopted an ordinance which prohibited all persons from firing guns or pistols, or exploding any squibs or fire crackers within the limits of the city, under a penalty of five dollars for each offense. It prohibited also the use or exhibition of fire-

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works, etc., within the limits of the city, without the written permission of the mayor, under a penalty of twenty dollars for each offense, etc.

On 15th December, 1873, the defendants, in disregard of its duty, etc., passed an ordinance suspending the above ordinance from 25th December, 1873, to the 1st January inclusive. On the evening of the 1st January, 1874, a crowd of boys and men collected in a street of the city near a building of the plaintiff, and there negligently fired off squibs, fire crackers, Roman candles, etc., whereby the said building caught fire and was burned, to the damage of the plaintiff, etc. The defendants demurred.

We conceive that nothing can be clearer, than that when a general authority is given to a municipal corporation to be exercised through its proper legislative officers, to make ordinances for the good government, health and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities, to determine what ordinances are proper for those purposes. Such a charter gives power, and in a moral sense imposes duties, for in that sense there can be no power to be used for the benefit of others, that does not carry with it a moral obligation to use it to the best of the grantee's judgment and ability, for the purpose for which it is given. But it does not impose such distinct and specific duties as to enable a court to say in any given case, that they have not been performed. If a court should undertake to say, that by reason of this general grant of power, it was the duty of the municipal authorities of Charlotte to pass and retain in force an ordinance prohibiting the use of fire crackers, etc., and that the city was liable to any person damaged by reason of such omission, there is no reason why the court should not adjudge the city liable in every case where the authorities had omitted to pass any other ordinance, which, in the opinion of the court, would have been proper for the good government of the city, or the health or safety of the inhabitants, or of their property. A court assuming to do this, would arrogate to itself the legislative power of the city authorities, and it cannot be supposed possible that any court will be guilty of such an usurpation.

Undoubtedly a charter or other statute may imperatively impose on a municipal corporation a well-defined duty of such a character, that a person injured by its neglect will be entitled to damages, although the statute does not *directly* impose this liability. As where a city is empowered to keep the streets and sidewalks in repair. *Cooley's Const. Lim.* 247; *Mears v. Commissioners of Wilmington*, 9 Ired. 78.

But in this case it was evidently left to the discretion of the authorities to determine, from time to time, what ordinances were proper for

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the ends in view. It may have been wise or not to pass the ordinance cited, and wise or not to suspend its operation. Some cities have such ordinances, others have not; probably in most, the firing of crackers is tolerated on public holidays. But the question whether wise or not, is not for a court to determine.

The principle we have stated is amply sustained by the authorities. Judge DILLON in his work on Municipal Corporations, § 753, thus states his conclusion, upon a review of the cases :

“A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character.”

In *Wilson v. The Mayor, etc., of N. Y.*, 1 Den. 595, the court say: “The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain and imperative — and every ministerial duty is so — the delinquent officer is bound to make full redress,” etc.

“But when the duty alleged to have been violated is purely judicial, a different rule prevails, etc. And although the officer may not in strictness be a judge, still if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed.”

In *Kelly v. City of Milwaukee*, 18 Wis. 88, it appeared that the city had power by its charter to prevent swine, etc., from running at large, and had neglected to pass any ordinance in pursuance of that power. A hog running at large in the streets, entered the premises of the plaintiff, and injured some clothes, for which he brought the action. The opinion of the court is a very sensible one, and the judgment is for the defendant.

There is error in the judgment below overruling the demurrer.

PER CURIAM.

Judgment reversed and demurrer sustained.

NOTE.—See *Wheeler v. Cincinnati* (19 Ohio St. 19), 2 Am. Rep. 368; *Fisher v. Boston* (104 Mass. 87), 6 id. 196; *Grant v. Erie* (69 Penn. St. 420), 8 id. 272, and note; *Forsyth v. Mayor* (45 Ga. 152), 12 id. 576.

Lance v. Hunter.

LANCE v. HUNTER, appellant.

(72 N. C. 178.)

Consideration — act in aid of rebellion.

Plaintiff contracted to convey land to defendant in consideration that defendant would serve in the Confederate army as a substitute for plaintiff's son. Defendant served as such substitute and took possession of the land. *Held*, that the contract was void and plaintiff entitled to recover possession of the land.

A PPEAL by defendant from a judgment in favor of plaintiff in a civil action to recover a tract of land. The facts fully appear in the opinion.

Busbee & Busbee, for appellant.

M. E. Carter, for respondent.

BYNUM, J. The facts of the case are: that Joseph Lance, one of the plaintiffs, in 1868, contracted to sell the land in controversy to J. H. Hunter, the father of the defendant, and gave him a bond to make title, upon consideration that he would enter the military service of the Confederate States, and serve out the term of the war as a substitute for his son. That Hunter did enter the Confederate army as a soldier; served during the war, and in all things performed his part of the contract. That he has since died, leaving the defendant as his assignee of the contract and also one of his heirs at law, in possession of the land, to recover which this action is brought.

The parties have submitted the case upon the following agreement: "It is agreed that the whole case shall turn upon the validity in law of the said contract; if it is valid, they (the plaintiffs) shall not recover; if it is not valid, they shall recover."

We are relieved from any discussion of the single question thus presented, by the numerous decisions of this court, all to the same effect; that is, that all contracts such as this were in aid of the rebellion, and, as such, were against public policy and are void. *Smitherman v. Sanders*, 64 N. C. 522; *Oritcher v. Holloway*, id. 526; *Olemmons v. Hampton*, id. 264; *Leake v. Commissioners of Richmond*, id. 184; *Logan v. Plummer*, 70 id. 388; and *Davis v. Commissioners of Forsythe*, at this term.

The difficulty I had was, whether, both parties being *in pari delicto*, this court could lend its aid in restoring the plaintiffs to that possession

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which they gave the defendant, in part performance of the illegal contract. As, however, the contract was void *ab initio*, and as though it had never been, and the plaintiffs have the legal title, it would seem that, upon principle, they are entitled to recover. But there is little in the conduct of the plaintiffs, Lance, that commends it to a just or generous mind. Both the father, and the very son whose life was saved, perhaps, by the performance of the contract by Hunter, after the war and the danger are over, now seek to deprive him of a possession acquired at such peril, and in such good faith. Most persons of sound morals would rather be the defendant without, than the plaintiffs with the land.

There is no error.

Judgment affirmed.

STATE V. MANUEL, appellant.

(72 N. C. 201.)

Criminal law — malicious mischief.

It is not an indictable offense at common law to wound cattle maliciously.

APPEAL by defendant Shadrach Manuel from a judgment in favor of the State upon an indictment for malicious mischief in wounding animals belonging to the prosecutrix. The animals, which consisted of an ox and some hogs, as appeared by the evidence at the trial, were in the habit of breaking into defendant's field and injuring his crops. Upon one of those occasions defendant killed the hogs and chopped the ox with an axe. To certain charges of the court below not material here the defendant excepted, and the jury having found him guilty and a motion for a new trial being refused, this appeal was taken.

J. W. Hinsdale, for appellant.

L. S. Hargrove, Attorney-General, for State.

BYNUM, J. This indictment is not founded on the statute (Bat. Rev. chap. 82, §§, 94, 95), but is at common law; and the question is, is it an indictable offense at common law to wound cattle maliciously.

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It has been held in this State indictable to set fire to and burn tar in barrels, to kill a steer, and to kill a dog with malice toward the owner. *State v. Simpson*, 2 Hawks, 460; *State v. Scott*, 2 Dev. & Bat. 35; *State v. Latham*, 18 Ired. 88; and to burn plows and harness. *State v. Jackson*, 12 id. 829. But in all these cases the property was killed or destroyed; and no case is to be found in our reports, of an indictment at common law, when the offense was the wounding of cattle or the mere injury to the property, short of its destruction.

If we look to England, the source of the common law, we are unable to find a case where, independent of statute, it has been held to be a public offense to maim cattle, whether with or without malice toward the owner. Both the elementary writers and the decisions hold that such offense is not indictable, but is a civil trespass only. 4 Bl. Com. 244; 2 East's Pl. Cr., ch. 21, § 16; 2 Russ. on Cr. 497; *Regina v. Wallace*, Cr. and D. Cr. Cases, 408; and no precedent of such a form of indictment, at common law, or independent of statute, is to be found. Arch. Cr. Pl. 182; 3 Chitty's Cr. L. 1087.

In the American courts the decisions upon this subject have not been uniform; and in several of the States malicious mischief, as a common-law offense, has received a much more extended interpretation than has been attached to it in England. *People v. Smith*, 5 Cow. 258; *State v. Teischer*, 1 Dall. 335; *Loomis v. Edgerton*, 19 Wend. 419. But even in these cases, the *corpus* of the property was destroyed; and it will be difficult to find a case where injuries short of destruction have been held to be indictable at common law, and certainly the weight of authority in both countries is decidedly the other way. *State v. Beckman*, 3 Dutch. 124, and authorities therein cited.

This court will not be warranted in expounding the common law so as to make offenses indictable which were not clearly indictable before. That is a matter for the consideration of another department of the government. We have, by statute, made it an indictable offense, unlawfully and on purpose, to kill or maim live stock, under the circumstances described in the statute before cited, but not under all circumstances. Whether the interests of justice and sound morality do not require the punishment, as a public offense, of all wanton cruelty to live stock, is a question which is attracting much public attention and discussion both at home and abroad, and deservedly so. The remedy for the evil is with the legislature. It is our province to declare the law to be that this indictment will not lie at common law, and that therefore judgment must be arrested.

There is error.

PER CURIAM.

Judgment reversed.

Abbott v. Cromartie.

ABBOTT, appellant, v. CROMARTIE.

(72 N. C. 292.)

Homestead — estoppel — landlord and tenant.

Under an execution against defendant, lands in which he had a right of homestead were sold. Subsequently he took a lease of such lands from the purchaser and after the expiration of the term thereof continued in possession. *Held*, that he was not estopped from claiming homestead in the lands but could not set up that defense to an action by his landlord to recover possession thereof.

APPEAL by plaintiffs, Abbott and Foster, from a judgment in favor of defendant in an action in the nature of ejectment.

In 1868 defendant was the owner of certain lands in which he had a right of homestead. Upon a judgment rendered against him during that year execution was issued and the lands were sold to one Patrick Cromartie, from whom defendant took a lease thereof for the term of three years. During such term Patrick Cromartie conveyed his title to one Eldridge, who conveyed to plaintiffs. After the expiration of the term defendant kept possession of the lands and had his homestead therein set apart. Such other facts as are material appear in the opinion.

R. H. & C. C. Lyon and *W. McL. McKay*, for appellants.

W. S. & D. J. Devane and *Smith & Strong*, for respondent.

BYNUM, J. The plaintiffs do not deny that, at the time of the execution sale, the defendant was entitled to a homestead in the land sold. It is an estate confirmed by the Constitution, art. 10, § 2, and is not the subject of levy and sale under execution. The sheriff's deed therefore could pass to the purchaser only what he had the right to sell, i. e., the land, subject to the homestead estate. This much is clear. But it is alleged and not denied, that the defendant in the execution, who is also the defendant in this action, after the sale, accepted from the purchaser a lease for three years, and continued in possession under that lease until it expired. That he then continued in possession of part of the premises which he had assigned to himself as a homestead, after the execution sale and the lease.

This acceptance of a lease from the purchaser, it is contended, established the relation of a landlord and tenant between the plaintiffs and defendant, and that the defendant is estopped from setting up a title to

the land adverse to that of the plaintiffs. To this the defendant answers, that if the execution, sale and deed did not have the effect of passing the title to the homestead, the acceptance of a lease afterward could not have had that effect, for that an estate or interest in lands cannot be passed without a deed or writing, so that the title of the defendant was the same after, as before, the lease, the only effect of which was to estop him from denying the title of the purchaser, during the continuance of the lease. The plaintiffs reply to this, that the principles of estoppel extend farther and do not permit the defendant to set up title until he has surrendered the possession and put the landlord in the same plight and condition he occupied prior to the lease, and that even then he could not assert title, because he had in this case waived his right of homestead, and so lost it absolutely. The defendant answers the plaintiffs by denying :

1st. That his acts constituted a waiver of his homestead ; and 2d. That the law will compel him to surrender his possession, when he has the title and his lease has expired.

We hold with the defendant, that the acceptance of a lease, the only act alleged as constituting a waiver of the homestead, does not have that effect. The defendant owned the legal estate in the land, and the Constitution confers no new estate upon him, but only confirms an existing one, to the extent therein expressed, and restricts his powers of alienation and to charge it with his debts. Having, then, the estate in the land exempt from execution, he can part with it only by the formalities prescribed by law. It is true we have the legal maxim, *quilibet potest renunciare juri pro se introducto*, under which a party may renounce valuable rights and advantages, but it can have no application where an express statute enjoins a compliance with the forms it prescribes. For instance, a testator cannot dispense with the formalities which are essential to the validity of a testamentary instrument, as prescribed by statute ; so a grantor cannot dispense with the forms of conveyance of an estate or interest in lands, prescribed by the statute of frauds. The defendant then has not parted with his homestead by accepting a lease. But on the other hand, we hold with the plaintiff that the defendant has shown no defense to this action. No proof of title is required when the action is brought by a landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord by accepting a lease from him, he is precluded from showing that the plaintiff had no title at the time the lease was granted ; for it is a general rule founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title, or to set up against him, during the tenancy

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one which is hostile in its character, to that which he acknowledged in accepting the demise. The possession of the tenant is the possession of the landlord, and so long as the possession subsists, so long does the relation of the landlord and tenant exist. To that extent are all the authorities. Taylor's Landlord and Tenant, 515 and notes. It follows that this relation and the rights growing out of it can be destroyed only by surrendering the possession to the landlord, as it existed prior to the lease. When that is done and not before, the defendant is at arm's length and can assert his title by action or otherwise. *Wade v. Saunders*, 70 N. C. 277.

In *Halloway v. Camby*, 65 N. C. 681, and in *Turner v. Lowe*, 66 id. 418, it is held that the tenant, though he cannot dispute his landlord's title, is not precluded from showing an equitable title in himself, or any matter making it inequitable to deprive him of the possession, but these cases are put upon the ground that the relation of the landlord toward the tenant was that of trustee, and these cases have no application here.

PER CURIAM.

Judgment accordingly.

STATE V. GASTON, appellant.

(73 N. C. 98.)

Criminal law — larceny — principal and accessory.

In petit larceny there are no accessories but all are principals. Accordingly, where there is no distinction between grand and petit larceny, and all felonious stealing is punished as petit larceny, one aiding, abetting or advising a larceny is indictable as principal.

APPEAL by defendant, Hilliard Gaston, from a judgment entered upon a verdict of guilty on the trial of an indictment for larceny. The facts sufficiently appear in the opinion.

L. S. Hargrove, Attorney-General, for the State.

Mr. Russell, for the prisoner.

SETTLE, J. The defendant being charged in a bill of indictment, containing a single count, with the larceny of a cow, "of the value of one dollar," prayed the court to charge the jury "that this being a felony.

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only those who were present could be guilty as principals, and those advising and counseling could not be convicted under this bill of indictment." The court refused the prayer, and charged that if the prisoner counseled, aided, abetted or advised the larceny, he was guilty.

The text-books tell us that in high treason and petit larceny there are no accessories, but all concerned are principals, for different reasons however, which we need not state here, as the learning is so familiar. 1 Hale, 715; 2 Hawk. P. C., c. 29, 1, 24; 4 Bl. Com. 36; 1 Bish. Crim. Law, 39, 622. These authorities are followed by our own decisions. In *State v. Barden*, 1 Dev. 518, it is said "all who are concerned in petit larceny are principals," etc. In this indictment the value of the cow is laid at more than twelve pence, to wit, one dollar, which at common law constituted grand larceny, and the defendant was entitled to the charge prayed for if the evidence made it appropriate, unless our statute abolishing all distinctions between grand and petit larceny has the effect to reduce grand larceny to the grade of petit larceny.

Bishop, in his work on Criminal Law, § 622, says: "Whether grand is reduced to petit larceny under American statutes, abolishing or modifying the general distinction between grand and petit larceny, is a question upon which we appear to have no adjudications.

The defendant's counsel argues that after the distinction between grand and petit larceny was abolished by 7 and 8 Geo. IV, every larceny in England was raised to the grade of grand larceny. So it was. But an examination of the English statute will show that it is just the reverse of ours, and while it raises, in express terms, petit to grand larceny, ours draws grand down to the grade of petit larceny.

We quote them in contrast. The English statute enacts "that the distinction between grand larceny and petit larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act," etc., and provides for trying "all accessories to such larceny."

Our statute enacts: "All distinctions between petit larceny and grand larceny, where the same hath now the benefit of clergy, is abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is," etc. Bat. Rev., ch. 32, § 25.

Our conclusion is, that the charge of his Honor was correct.

Let it be certified that there is no error.

Judgment affirmed.

State *ex rel.* Barnes v. Lewis.

STATE *ex rel.* BARNES v. LEWIS, appellant.

(73 N. C. 133.)

Suretyship — conditional contract — guardian's bond.

A guardian's bond recited that it was executed by L. and P. as sureties. L. signed but P. did not. *Held*, that L. could not show, as a defense to an action on the bond, that he was induced to sign by a promise that P. would also sign it, which promise he had always believed was fulfilled.

APPEAL by defendant from a judgment in favor of plaintiff in an action against defendant as surety upon a guardian's bond. The only important question was raised by the offer on the trial by defendant to show that as an inducement to the execution of the bond by him one Speight, the guardian, promised that one Powell would also sign as surety; that when he signed, the name of Powell appeared on the bond as one of the sureties, and upon the strength of that promise he signed, and that not until long after such signing did knowledge of the fact that Powell did not sign come to him. Other facts appear in the opinion.

Battle & Son and J. W. Johnson, for appellant.

Howard & Perry and D. Battle, for respondent.

RODMAN, J. The defendant is sued as surety for one Speight, on a bond given by Speight as guardian for the relator. He makes two defenses: [The first defense was not important.]

2. The defendant "proposed to prove by himself that the said John F. Speight, now dead, as an inducement to his signature of the bond as surety, stated that one Jesse H. Powell would also sign the bond as surety, and that, upon that promise and understanding, defendant agreed to sign the same as surety, and that, when he signed the same in presence of the court, the bond was filled up, and on the face thereof, the name of said Powell appeared as one of the sureties, and defendant had no knowledge that said Powell did not sign the same as surety, until about four years ago." The court refused to hear the testimony, and defendant excepted.

The propriety of the rejection of this testimony depends entirely on its materiality. If the facts proposed to be proved would have made a sufficient defense, either to the whole or to any part of the relator's claim, the testimony was material, and should have been received. If, however,

it would not have been a defense, it was immaterial, and was properly rejected.

The authorities bearing more or less directly upon the question thus presented are numerous, and not always consistent, and I have not anywhere met with an attempt to classify them, and to extract the general rules which they establish. The task would be a laborious, and if fairly done, a useful one. The members of this court, however, have no time for such tasks. All that we shall undertake to do will be to distinguish certain classes of cases from the present, and to state the grounds of our decision in the present case.

An official bond is presented to a person who is solicited to sign it as a surety, and the names of certain other persons are recited in the body of the bond, and appear signed to it, and the person solicited to sign believes that their signatures are genuine, when, as afterward appears, they are forged, the surety is not bound. *Seely v. The People*, 27 Ill. 173; *Chamberlin v. Beaver*, 8 Bush (Ky.), 561. But *contra*, *Bigelow v. Comegys*, 5 Ohio, 256.

2. If it is agreed *between the parties* to an obligation that it shall not be valid unless executed by all of certain persons, it is not valid until so executed. Thus, generally expressed, the rule is unquestionable; but it is subject to be controlled; as for example, if it be afterward delivered absolutely to the obligee by a part of the proposed obligors only. *State v. Peck*, 53 Me. 284. And the older authorities are, that it cannot be delivered to the *obligee* as an *escrow*.

In the case of an official bond taken under the authority of a court, probably a notice *to the court*, assented to by it, that a surety had signed the bond and left it with the clerk (and *a fortiori* with another person), to be delivered on condition only, would defeat a delivery before performance of the condition. It may be doubted whether notice to the clerk, who is not the agent of the court for such purpose, and has no authority to assent to any such condition, would have any effect. But this question need not be discussed, as it will appear in the present case that no such notice was given to either the court or its clerk.

3. If the delivery of an official bond made, not to the officer authorized to receive it, but to the principal obligor, on the condition that it is not to be delivered until certain other persons named in the body of the bond shall execute it, and the principal obligor nevertheless delivers it to the agent of the obligee, without execution by such other persons, and without other notice of the condition than is to be implied from the names of such persons appearing in the body of it, the sureties who have signed are not bound. *Pawling v. United States*, 4 Cranch, 219. This case

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has been severa' times questioned, and there are decisions opposed to it, on the ground that the obligee could not be bound by a condition of which he had no notice. But it may, perhaps, be supported, on the ground that the appearance in the body of the bond of the names of persons who had not signed was of itself notice that the instrument was incomplete, and its delivery by the *principal obligor alone* was unauthorized. Had it been delivered by the sureties who signed, the case would have been different. *Sharp v. United States*, 4 Watts, 21, is to the like effect, with the difference, that in that case the act of Congress under which the bond was given, required *two* sureties, which might help both to induce the one who signed to believe that it would not be taken without the signature of the other, and also to notify the receiving officer that it was incomplete.

Pepper v. State, 22 Ind. 399, may be referred to in this connection, although as that volume of the Indiana Reports is not accessible to us, we can only refer to it.

To return to our case. The following entry appears of record in Edgecombe County Court, at November Term, 1856, at which the bond sued on was given: "John F. Speight is appointed guardian for James A. Barnes (the relator), and enters into bond in the sum of \$15,000, with William T. Lewis (the defendant) as his surety."

It must be inferred from this that Speight never offered to the court any other surety than the defendant. This the defendant might have known upon inquiry, and his ignorance of it proves at least some degree of negligence.

This record also establishes that the instrument was delivered by Speight and the defendant absolutely as their deed, without qualification or condition. If the defendant then intended that the delivery should be conditioned on Powell's signature, a prudent caution, as well as fair dealing toward the ward, required him then to have stated such condition to the court or at least to the clerk. It may be doubted, as was said before, whether such a statement to the clerk would have been effectual, as the clerk is not authorized to receive *escrows*. But that question is immaterial, as the instrument in question was not so delivered. It is contended, however, that the fact that Powell's name as a surety appeared in the body of the bond was of itself notice that the instrument was incomplete without his signature, and that the delivery was conditional. It will be seen that this proposition is not supported by the cases of *Parling v. U. S.* and *Sharp v. U. S.*, *supra*, because in those cases the absolute delivery was not made by the surety, but by the principal alone 'n the absence of and contrary to the instructions of the surety.

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It is not supported by any case that has fallen under our notice. It may be admitted that the circumstance relied on is, ordinarily, and in the absence of any circumstances to control it, proof of notice that the instrument is at the time incomplete. But an absolute delivery as a deed by a party executing it is incompatible with a delivery on condition, and supersedes as to him any previous notice of incompleteness. It estops the party from any defense inconsistent with it. *Adams v. Beans*, 12 Mass. 189; *Outter v. Whittermore*, 10 id. 442; *Scott v. Whipple*, 5 Greenl. 836; *Haskins v. Lombard*, 16 Me. 140; *State v. Peck*, 52 id. 284; *Bigelow v. Comegys*, 5 Ohio St. 256.

The clerk, upon the unqualified delivery to him of the bond, executed by all the persons whose execution was required by the order of the court, might reasonably believe, that if an intention that Powell also should sign had ever existed, it had been abandoned. In this connection we refer to the judicious remarks of the court in *Luly v. People*, 27 Ill. 178, in which the surety had been induced to sign, by the forgery of an antecedent name.

“By a fraud practiced by the defendant, by means of the commission of a high crime, he was made to assume a different and greater liability than he intended, or supposed he was assuming. It is not like the case where the surety, when he signs the bond, is assured and made to believe that others will afterward sign it. In that case he acts upon the simple assurance that another will do an act which he knows may be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled.”

As the case stands, the defendant confides in Speight; his condition that Powell also should sign is communicated to Speight alone; he fails to use ordinary caution either to protect himself or to protect the relator. Clearly this was negligence. By his negligence the defendant enabled Speight to become possessed of the *indicia* of a guardian, and to obtain into his possession the property of the relator, which he wastes, and then dies insolvent. No fraud is imputed to the defendant; but no principle of equity is better established than that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

This doctrine is not confined to negotiable securities, but is of general application, and it would seem to apply with especial force to the bonds of administrators and guardians.

There is no error in the judgment below.

PER CURIAM.

Judgment affirmed.

People *ex rel.* Van Bokkelen v. Canaday.

PEOPLE *ex rel.* VAN BOKKELEN v. CANADAY, appellant.

(73 N. C. 198.)

Constitutional law — right of suffrage — registration—apportionment of representation.

The constitution of North Carolina provides that "every male person twenty-one years old resident in the State twelve months and in the county thirty days, shall be an elector." *Held*, that a statutory provision requiring ninety days residence as a qualification for voting for city officers was unconstitutional. *Held*, also, that under a constitutional authority to provide for registration, the legislature could not enact a registry law practically disfranchising electors.

A statute gave to each ward of a city an equal number of aldermen in the municipal council, but so divided the city that two wards contained 400 voters each, while the remaining ward had 2,800 voters. *Held*, in violation of the principle, that representation should be apportioned as near as may be to the popular vote, and void.

APPEAL by defendants from a judgment in favor of the relators in an agreed case submitted to the court. The relators were, under the provisions of an act of the General Assembly of North Carolina, passed on the 3d of February, 1875, which amended the charter of the city of Wilmington, elected aldermen of said city. The respondents, who had previously been elected aldermen, claimed to be entitled to hold the offices under the provisions of the charter providing for the continuance in office of municipal officers until their successors should be elected and qualified, upon the ground that the law amending the charter was in several essential particulars unconstitutional and void. The particulars were these: First, the amendment made an invalid provision as to residence. This is as follows:

"Every male person twenty-one years old and upward shall be entitled to registration, who shall have resided twelve months in the State and ninety days next preceding the election, in the lot, the block and the ward in which he resides at the time of applying for registration, and no other person shall be so entitled."

Second. It made certain provisions in respect to registration that when carried into effect rendered registration and voting impracticable on the part of those entitled to vote.

Third. By a division of the city into three wards, each ward being entitled to the same number of aldermen in the city council, it gave to a small number of voters residing in the first and second wards twice the number of representatives that more than three times the number residing in the third ward had. The voters in the first and second wards numbered 800, those in the third ward 2,800. Such other facts as may be of importance appear in the opinion.

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Russell, Shipp & Bailey, Fowle, Badger and Haughton, for appellants.

Strange and Smith & Strong, for relators.

READE, J. Our government is founded on the will of the people. Their will is expressed by the ballot. The ballot embraces every citizen twenty-one years old, who has had a residence in the State for twelve months, and in the county where he offers to vote, for thirty days. There is no other qualification required. Property qualifications for voters and office-holders, which our former Constitutions required, and which many thought important, have passed away, and are now regarded as antiquated. Not only is freedom to vote and hold office secured in our present Constitution, but it is so imbedded in the hearts of the people that it was thought necessary to stipulate against any interference with it by a contemplated convention to alter the Constitution. The act of the last General Assembly calling a convention has a provision that the convention "shall not require, or propose any educational or property qualification for office, or voting," and requires the delegates to take an oath to observe it.

Whether that is wise or unwise, the court can give no opinion. Our province is to expound the Constitution and laws as they are made, and not to make them.

The Constitution provides that every male person twenty-one years old, resident in the State twelve months, and in the county thirty days, shall be an elector — Art. VI, § 1. An elector for what? The Constitution does not say for what. Does it mean elector for president, or for members of Congress, or for governors, or for judges, or for members of the General Assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation — that every such person shall be an elector — a voter. It evidently means to designate those persons as a *class*, to vote generally whenever the polls are opened and elections held for any thing connected with the general government, or the State or local governments. Just as a class of persons are designated as qualified for jurors.

And so in Art. VII, § 1, it is provided that all *county* elections shall be by "the qualified voters thereof." But who are they? There is no way of determining except to look back to the *class* designated above.

And so the 5th section provides, that *township* elections shall be by the "qualified voters thereof." And we have to look to the *class* to find out who they are.

And so Art. VII, § 7, provides that no county, city, town, or other

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municipal corporation shall contract any debt, etc., unless by a vote of a majority of the "qualified voters therein;" and we have to look to the *class* to find who they are.

Here counties, cities and towns are grouped together; and so are their qualified voters. And except in this way there are no qualifications prescribed for voters in cities and towns. But cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government. And the qualifications of their voters are the same. It follows, that the General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections.

And yet the act which we are considering requires a residence of ninety days, instead of thirty. And if ninety days may be required, a year, or years may be. And so, in many of our young and growing towns, a majority of the citizens may be excluded, and the government given to "the oldest inhabitants;" or, if long residence may be made a qualification, so it may be made a disqualification, and then the government may be given to the youngest inhabitants. And so, if *these* qualifications may be added, then any *others* may; just as we find that in one of the town charters granted by the last General Assembly, it is provided that, in addition to the citizens of the town, all persons who have lived in the county twelve months "and who own taxable real estate in said town, who have paid all the taxes," etc., shall be allowed to vote. Acts of 1874-'5, ch. 157, Private Laws. Surely the legislature had no power to put any portion of the people of the State under such a government. If they can do that, then they can put Wilmington under the government of the land owners of New Hanover county.

For illustration: a man presents himself at a town election and says, I have voted in the State election, in the county election, in the township election, and now I want to vote in the town election, where I have lived thirty days. His vote is rejected, because he has not resided there ninety days. In vain we look in the Constitution for any such qualification. The General Assembly has disfranchised him, and that in a case which comes much nearer home to him than any other election; for the town government affects his business, trade, market, health, comfort, pleasure, taxes, property and person.

We are of the opinion that the qualifications for a voter in a city or town are, citizenship, twenty-one years of age, twelve months' residence in the State, and thirty days in the city or town.

II. Again: The act provides that before an election there shall be a registration of voters, and only those who register can vote. The first

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ward is made a registration and election precinct ; and so with the second. The third ward is divided by metes and bounds into four precincts. Of course every voter must register in the ward and in the precinct where he lives, and in no other, and must vote where he registers, the object being to prevent fraud by "repeating." But a large portion of the third ward — on the west side of the river — was, by mistake probably, not included in any of the precincts. And of course they cannot register and vote. And *Perry v. Whitaker*, 71 N. C. 475, is an express decision that that makes an election void.

Indeed, it would seem that the registration provisions for such parts of the city as are embraced, are so impracticable as to amount to the disfranchisement of the voters.

The Constitution ordains that the General Assembly shall provide for the registration of voters, and that no one shall vote without registration. Art. VI, § 2. This means that the General Assembly shall provide the conveniences and necessities, so that the voters can register. It is to facilitate the exercise of the right of the ballot ; and not to defeat it. It is true that this includes the power and the duty to throw such guards around as will protect the ballot from fraud. And therefore our general election law provides, that when a voter offers to register, or vote, he may be challenged, and required to take an oath as to his qualifications. And so in our general law regulating town elections. (Battle's Revisal.)

There can be no objection to that, and it prevents no man from voting, and puts him to no inconvenience. If a man will swear that he has the qualifications, then he can register and vote ; unless it can be proved against him that he is not entitled. And in that case he can be rejected. But the act under consideration is framed upon the idea of making the ballot as difficult as possible. Indeed it makes it impracticable. It provides that "any elector may, and it shall be the duty of the registrar to challenge the right of any person to register, known or suspected not to be lawfully entitled to register ; and when such challenge shall be made, it shall be the duty of the registrar to require such person to prove to the satisfaction of the registrar the fact of his being of lawful age to vote, the fact of his residence for twelve months in the State, and for ninety days in the lot," etc. It will be noted that any bystander may challenge the voter without proving any thing against him, and the voter is not allowed to swear to his qualifications ; but he must prove them by the oaths of others, and these others must be known to the registrar, and the registrar must be satisfied. Now, how is it possible for persons who move into Wilmington from other counties in the State to get witnesses from a distance known to the registrars in Wilmington to prove their ages and their

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residences? It is impossible. It is a practical denial of the right to register and vote.

III. It has been already said that towns and cities are but parts and parcels of the State for the convenience of local self-government, and that the voters, and the rights of voters, are the same as in the State government. A fundamental principle in the State government is, that representation shall be *apportioned* to the popular vote *as near as may be*. Large counties and large districts shall have more representatives than small ones, so that not only every man may vote, but his vote shall count in the representative body.

The act creates a representative legislative body — board of nine aldermen, for the city of Wilmington. Now, if every voter could vote for all of the nine aldermen, of course every man's vote would count. Or, if the city were divided into three wards, as nearly equal as may be, and each ward elect three of the aldermen, then every vote would count. But instead of that the city is divided into three wards — the first has about 400 voters; the second about 400; and the third 2,800. So that one vote in the first and second wards counts as much as seven votes in the third ward. That this is a plain violation of fundamental principles, the apportionment of representation, is too plain for argument. That the legislature never intended such a result, we are obliged to assume. Nor is there any thing stated in the case that can reasonably account for it. To the suggestion that it was to protect property from irresponsible voters, it is answered, that it is stated in the case that the valuation of property in the third ward is about equal to the valuation in both the other wards put together. And to the suggestion that it was to separate the colored from the white vote, it is answered, that while most of the colored voters are in the third ward, yet there are also more white voters in the third ward than in both the other wards together. And to the suggestion that it was to favor the intelligent and educated and give them control of the city government, it is answered, that by the same legislature such a principle is expressly repudiated as existing in the present Constitution, and is expressly prohibited from being incorporated in any subsequent Constitution. The convention "shall not require, nor propose any educational or property qualification for office or voting." And to the suggestion that it is a plan devised by the city for its better government, it is answered, that not one voter in five voted at the election.

At any rate, without questioning the intent of the legislature, we see that the effect of the act is to violate the fundamental principles of the Constitution, and their own cherished and declared purpose to maintain free manhood suffrage, and to eschew educational or property qualifica-

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tions. And, as is said in *Jacobs v. Smallwood*, 68 N. C. 112, it is the effect of the act, and not the intention of the legislature, which renders it void.

It is usual in *quo warranto* to inquire first into the title of the defendant to the office; but we are precluded from that inquiry here by the case sent us, as we are confined to the record, which is as follows:

"Upon the foregoing facts it is submitted to the honorable, the Superior Court of New Hanover county, to determine the following questions:

"1. Whether the relators of the plaintiff are now entitled to the said office of aldermen of said city? 2. If not entitled now, will they be so entitled from and after the first Thursday in August, etc.?"

"And it is agreed that if the court shall be of opinion in the affirmative upon either one of said two questions, judgment shall be rendered that the defendants shall be ousted from the said offices, and that the relators be put in possession thereof."

(Signed by the attorneys for the parties.)

It was insisted upon the argument here, that if the title of the relators is bad, the title of the defendants is bad also, and for the same reason. But it will be seen that the only point presented to us is, as to the title of the relators.

There is error.

RODMAN, J., dissents from the reasoning in the third ground taken by the majority of the court, but concurs in the remainder of the opinion and in the result.

Judgment reversed.

MOORE v. GREEN, appellant.

(73 N. C. 394.)

Arrest on civil process — privilege. Constitutional law — imprisonment for debt

A person brought into court upon criminal process and admitted to bail, held, not privileged while in court from arrest on civil process.

A statute allowing an arrest in an action for libel does not violate a constitutional provision that "there shall be no imprisonment for debt except in cases of fraud."

APPEAL by defendant from an order refusing a motion to vacate an order of arrest. At a term of the Guilford Superior Court held in 1874 the presiding judge, upon an affidavit of the prosecutor, issued a

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warrant for the arrest of defendant upon a criminal charge of libel. Defendant was arrested and brought into court. He waived an examination and offered bail to appear and answer. The bail was accepted, the proper undertaking executed, and defendant, by order of the court, discharged. At this time he was in custody in the bar of the court. As soon as defendant was discharged the sheriff sat down beside him in the bar and served a summons in a civil action of libel commenced by the prosecutor in the criminal proceeding, and also an order of arrest issued by the court therein, and took him into custody. The defendant then made this motion for a discharge from arrest on the civil action on the ground that at the time it was made he was privileged from arrest.

Scott & Caldwell, and Merrimon, Fuller & Ashe, for appellant.

Gilmer and J. T. Morehead, for respondent.

RODMAN, J. Two questions of some importance are presented by the record in this case :

1. Was the defendant privileged at the time of his arrest ? The authorities which have been found on this point are very few, but they are very respectable and we consider them decisive. They establish a distinction between parties who are attending court prosecuting civil actions and persons who have been brought into court on criminal process and have been discharged from arrest under it.

In *Hare v. Hyde*, 16 Ad. and E. 394 *et seq.* (71 E. C. Rep. 373), the defendant Hyde had been tried for embezzlement and acquitted and discharged. Immediately afterward and before leaving the court-room, and whilst the court was still sitting, he was arrested on a *ca. sa.* On the hearing of a motion for his discharge, Lord CAMPBELL, C. J., said : " I am of opinion that the defendant had no privilege in respect of his having been tried and acquitted and ordered to be discharged. He was, after that, in the same position as any other of the *circumstances* in court. The cases show that an acquitted prisoner has no privilege *redeundo* ; and it follows that while remaining as a spectator, he has no privilege more than any one else." This rule must equally apply to a prisoner not acquitted but discharged from arrest on bail. There may not be any very strong reason for the distinction above stated. That which is suggested is, that parties in civil actions appear in court voluntarily, and should be encouraged to appear, by immunity from arrest ; whereas defendants in criminal actions appear involuntarily, and need not be encouraged. Perhaps another reason may be the probable difficulty of finding persons of the class of those who are most generally arrested for

crime. But whatever the reason may be, as the rule is not apparently unreasonable or oppressive, we feel bound to abide by the law as we find it to have been heretofore declared.

In the case cited, as in the case before us, the defendant was arrested during the sitting and in the presence of the court. It was held that the prisoner was not thereby necessarily entitled to his discharge ; that the court might, in some cases, order his discharge, and might treat the arrest as a contempt ; but if that court did not think proper so to treat it, no other court would do so on the application of the prisoner. See, also, *Goodwin v. Lordon*, 1 Ad. & E. 378 (28 E. C. Rep. 106).

2. It is contended that an arrest in an action for a libel is in violation of section 16 of the Bill of Rights of this State, which says "there shall be no imprisonment for debt in this State, except in cases of fraud." The argument is this : The moment a judgment shall be obtained, the claim for damages is converted into a debt ; the person of the defendant is thereupon liberated, and his bail discharged. For what purpose then require bail, who are to be discharged at the first moment when their liability can be of any value ? It is an oppression to the defendant and of no possible benefit to the plaintiff. *Dellinger v. Tweed*, 66 N. C. 206, is cited as the authority for the proposition that the claim for damages is converted into a debt within the meaning of the Constitution, by the recovery of judgment. Undoubtedly, for some purposes, it is. An action of debt may be maintained on it, and a *fi. fa.* may issue on it. But to construe the above cited clause of the Bill of Rights, as forbidding imprisonment for any cause of action which, by judgment, would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes : those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the Constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for *debt*, they plainly imply that it may be allowed in actions which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz. : for a cause of action arising *ex contractu*, they responded to the general public sentiment ; but I know of no writer on the reform of law, who has recommended the abolition of punishment for trespassers and wrong-doers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from

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the State its power to impose a wholesome check on violence and wrong, and would tend to license disorders and law-breakings incompatible with the peace and welfare of society.

Dellinger v. Tweed has no application to the present case. It is confined to a construction of the article of the Constitution respecting homesteads.

There is no error in the judgment below.

PER CURIAM.

Judgment affirmed.

STATE, appellant, v. RICHMOND AND DANVILLE RAILROAD COMPANY.

(73 N. C. 527.)

Constitutional law — statute impairing obligation of contract.

A railroad company in which the State had a controlling interest, and which had a right under its charter to change the gauge of its road track at will, leased such road. *Held*, that a statute thereafter passed forbidding the lessees to change such gauge was unconstitutional as impairing the obligation of a contract. (BYNUM, J., dissented.)

APPEAL by the State from a judgment upon a special verdict rendered on the trial of an indictment against defendants for a violation of a statute forbidding a change of the gauge of the North Carolina Railroad. Laws North Carolina, 1874-75, chap. 159. The North Carolina Railroad Company was chartered in 1849, and constructed a railroad of the uniform gauge and width of four feet eight and one-half inches to the Neuse river, and operated the same until 1871, when it leased the same to the Richmond and Danville Railroad Company, one of the defendants, who took possession and thereafter began to change the gauge to five feet. Thereupon the act in question was passed by the general assembly. The State of North Carolina at the time the lease was made owned a controlling interest in the capital stock of the lessor company. Other facts appear in the opinion. The jury found a special verdict of the facts with the further finding that if the court should be of opinion that the "law is with the State, then and in that case we find the defendants guilty, otherwise we find the defendants not guilty." The court found that the facts would not authorize a conviction.

T. L. Hargrove, Attorney-General, for the State.

Merrimon, Fuller & Ashe, and *Strong, Fowle & Badger*, for defendants.

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RODMAN, J. It must be assumed in considering this case, that the matters decided in the case of the State against the same company which is now a defendant (72 N. C. 634), are the settled laws of this State, and admit of no question.

Two things were decided in that case :

1. That the lease of its road, etc., by the North Carolina Railroad Company to the Richmond and Danville Railroad Company was lawful and valid.

2. That the lessees, by virtue of the lease, had up to the passage of the Act of 1874-'75 a right to change the gauge of the North Carolina road.

With respect to the lease thus declared to be lawful, it must be observed that the State of North Carolina owned at its date, and still owns, two-thirds of the capital stock of the company which made the lease, and the governor, by and with the advice and consent of his counsel, had power to appoint a proportionate number of the directors of the company, who are removable in like manner. Sections 36 and 43 of charter ratified 27th January, 1849. In short, the State, as a stockholder, through its lawfully appointed officers, had the supreme control over every act and contract of the company, and the lease could not have been made without the express consent of the State. The lease expressly stipulated that the gauge might be changed, and the power to change it must be considered an inducement to the Richmond and Danville Railroad Company to take the lease.

The lease also contains the following provision : " And the said party of the first part (the North Carolina Railroad Company) for the consideration aforesaid, for itself, its successors and assigns, doth covenant with, and oblige itself unto the said party of the second part, its successors and assigns, that its stockholders and directors will not do any thing, or take any action as such stockholders and directors, that may or can interfere in any way whatsoever with the free use and operation and convenience of said railroad, and other property so hired, let, "farmed out" and delivered, by the said party of the second part, according to the terms and intent of these presents." Notwithstanding this, the State, through its attorney-general, shortly after the execution of the lease, commenced a suit against the Richmond and Danville Railroad Company, praying among other things, for an injunction against a change of gauge intended to be made by that company as lessees. This suit pended for over eighteen months, and soon after it was decided as above set forth, and after the Richmond and Danville Company had begun to change the gauge, as it was held it had a right to do, and as

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it had a right to have done long before ; and after the company had completed the change over a large part of the road, the general assembly enacted the act of 1874-'75, ch. 159, which (whatever may be its construction upon the language used) intended to prevent any further change, and to prohibit it, as well as a continuance of the change made just before, by penalties and punishments of unusual severity. It is contended for the defendants, that this legislation is a violation by the State of the contract made with the North Carolina Railroad Company in its charter, the rights and powers under which are held by the defendant company as a lawful assignee for value : and also of the contract made by the State as the governing power in the North Carolina Railroad Company with the defendant company.

It is also suggested that it appears from the records of the United States courts within this State, that ever since the making of said lease, the State through its creditors, to whom its stock in the North Carolina Railroad Company was pledged, has claimed and received its share of the rent payable under the lease. As this fact (if it be one) does not appear in the special verdict, it cannot be permitted to weigh with us.

Whether the act in question is open to the objection that it impairs the obligation of either of these contracts, is the important question presented to us. In considering it this court disclaims any power to avoid an act of the legislature upon an idea of protecting the honor or good faith of the State against any violation real or supposed of either, by that body, except so far as that duty is expressly enjoined upon it by the higher law of the Constitution, which its members have sworn to support.

It is seen that the proposition of the defendants is that the act violates :

1. The charter to the North Carolina Company, of whose rights and powers the defendant company is the lawful assignee ; and
2. The contract of lease made by the North Carolina company and by the State, as its chief stockholder and governing power, under the laws of the State, to the defendant company.

These two propositions, though supported mainly by the same arguments, require to be noted, are not identical, for some observations which are applicable to the second proposition are not applicable to the first.

It is too late to question that a charter to a railroad company is a contract between the State and the company, which the State cannot violate. When a corporation has franchises and powers which it may lawfully assign (as the North Carolina Railroad Company had), the assignee takes the place of the assignor, and is equally entitled to the protection

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of the law. The defendant company, at the passage of the act, held an admitted right to change the gauge as it thought proper. The act prohibited the use of that right and *apparently* impaired the obligation of the charter. The burden is upon those who defend the act to find some recognized principle of law and reason on which it can be supported.

The counsel for the State have undertaken to find this principle in the general police power of the State, and we agree with them that it is to be found there if anywhere, for a right to regulate internal traffic over railroads and navigable waters is but a part of the police power of the State, and is subject to the same limitations and restrictions as that power is. Admittedly, this power is very extensive, and I am not aware that any jurist has yet undertaken to circumscribe and define its limits by any continuous line. All that the courts have done or can as yet attempt to do, is to make a dot here and there by the decision of a particular case as being within or without the line and leave it to our successors to connect them by a well-defined line when they are able to do so. The nearest approach to an attempt of this sort which I have seen is in chapter 16 of Cooley on Const. Lim., and especially on pages 572 and 577. The learned author cites probably all the cases having any direct bearing on the subject of discussion. From these we conclude that the legislature has power to impose all such regulations on railroad companies in the use of their roads as may be reasonably proper for the safety, and perhaps the comfort and convenience of passengers and of all others entitled to use the road, and for the protection from injury of the inhabitants and property of the country through which the roads pass. A railroad company, like all other owners of property, is subject to the maxim, "*Sic utere tuo ut alienum non laedas.*" Within that limit it has the same control over its property that an individual has, to use it as it may suit its ideas of its interest. A railroad company, although created in part for the advantage of the public, is not a public corporation in the sense that a county is. It is created also for private benefit, and in respect to those purposes it is a private corporation and its charter is a contract.

The rights of owners of adjoining coal mines are similar in some respects to those of railroad companies whose roads connect. On this subject see the valuable case of *Smith v. Kenrick*, 7 Man. Gr. and Scott. 515 (62 E. C. L. R.)

This police power, however extensive, must have reasonable limits. In some places it is said to extend to every thing "necessary for the welfare and prosperity of the State." But that would be to remove all limits. Such loose and ill conditioned expressions mean nothing definite. The limit

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of the power is the nature of the purpose to be accomplished, having due regard to the conflicting rights. A State cannot violate its contract under a pretended exercise of its police power. The act must be *bona fide* intended to relieve some evil within the reach of that power, and strictly applicable to that end. Among the instances held not to be embraced in it are these: In *Pingry v. Washburn*, 1 Aiken, 268, the legislature undertook to say that certain persons might go toll free over a road authorized by its charter to take toll generally. *Miller v. New York & Erie Railroad Company*, 21 Barb. 518, where the act required the company to make the preparation for a street to cross its track at its own expense. *Bailey v. Philadelphia, etc., Railroad Company*, 4 Harr. 389, and *Washington Bridge Co. v. The State*, 18 Conn. 58, where statutes infringing the chartered powers of certain bridge companies were held void. In *State v. Jersey City*, 5 Dutch. 170, it was held that the legislature had no right to regulate the speed of railway carriages except in the streets of cities, the necessity extending no further.

The act of 1874-'75, chap. 159, p. 185, does not appear to us to present the features of a police regulation. A gauge of five feet does not hazard the safety or convenience of persons using the road, or living along it. The act does not profess to be made for any of the purposes embraced within the police power. The purpose avowed is to compel an uniform gauge of 4 feet 8½ inches on the North Carolina Railroad and on certain other railroads connecting with it, which at that time had that gauge. It may be a wise and convenient policy to require an uniformity of gauge on all the railroads of the State, and it may be convenient to the roads connecting with the North Carolina road, that its lessees should be prevented from changing its gauge from one uniform with theirs, to a different one. But if the lessees of the North Carolina road had a right to change its gauge according to the ideas of their own interests (as in view of the decision of this court at the last term, must be admitted), no newly adopted policy of uniformity, or regard for the interests of other roads, will authorize the State to deprive the lessees of this right, *except by virtue of its power of eminent domain, and upon compensation*. Much less had the State the power to compel the lessees to restore to its former gauge, that portion of the road which, at some expense, it had changed before the act was passed.

This conclusion is strengthened by an anticipation of the consequences of a different one.

If the legislature can now lawfully establish the gauge of the North Carolina Railroad at 4 feet 8½ inches, it can equally establish it at a greater or less width, and can at any time hereafter compel or forbid a

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change. On the same principle it may at pleasure require or forbid the company to alter its route once adopted, in any particular, its station-house once located, and its rates of fare and freight. In short it may regulate in every detail the economic management of the road. Such a power would be practically despotic, and might be indirectly but effectually used to destroy the value of the charter and compel its surrender. The claim is new in principle, and no authority, or at least no direct authority, can be found to support it.

We are asked to distinguish this case from the *State v. Matthews*, 3 Jones, 451. I may not be able to show the distinction to the satisfaction of others. But I think there is a solid one. For whatever reasons the State had adopted a policy against the issue of bank bills under \$3, before it chartered the Bank of Fayetteville, this policy was apparent to all on its legislation. Prior to that charter no bank then existing was allowed to issue bills under that denomination. The omission of such a prohibition in the charter of that bank was apparently an accident. The case was evidently covered (independently of any contract excluding it) by the general police power of the State, and no injury was done to the bank in relieving the people from the ill consequences of the accident.

The above remarks, it will be seen, apply particularly to the act of 1874-'75, in respect of its bearing on the rights created by the charter to the N. C. R. R. Co., and our conclusion on that will dispose of this case. It will not be inappropriate, however, briefly to consider the act in reference to the provisions of the lease made by that company, in which the State as a stockholder had the controlling power, assuming for that purpose that in the absence of such lease the act would be a legitimate exercise of the police power. A State may undoubtedly contract away some portion of its sovereign rights, as this State was held to have done its rights to tax, in the charters of the Raleigh & Gaston Railroad Company, and of the Wilmington & Weldon Railroad Company. Whether a State can abridge its police powers, or any other of its sovereign rights, by a contract made by it, not in the exercise of its legislative powers, but through its authorized officers as the controlling or only stockholder in an incorporated trading company, is a question which I have never seen discussed. We do not propose to express any opinion on this question. But it certainly seems contrary to the ordinary principles of justice, that a State, through its authorized officers, should in one capacity make a contract conferring certain rights (to change the gauge), and therein expressly contract to do nothing to hinder the use of that right; and immediately afterward, in its sovereign capacity as legis-

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tator, enact a law to make any use of that right highly penal. The State appears in the attitude of receiving with one hand rent from its tenant and with the other expelling him from the possession.

If the contract had been procured from the officers of the State by fraud or corruption, it could undoubtedly be avoided on that ground. But so far as appears, there is no allegation of that sort. No legal proceedings to avoid the lease have been had on any such ground.

It is unnecessary also to consider the criticisms of the counsel for the defendants upon the language of the act, which is admitted by the counsel for the State to be very loose and uncertain.

PER CURIAM.

Judgment below affirmed.

BYNUM, J., dissented.

PEOPLE *ex rel.* NORFLEET V. STATON, appellant.

(73 N. C. 546.)

Officer de facto — when acts of, valid.

Respondent was appointed clerk of a court by the *de facto* judge who was then exercising judicial functions. *Held*, that the subsequent ouster of the judge would not oust respondent, but he could hold against the appointee of the judge *de jure*.

APPEAL by defendant from a judgment in favor of plaintiff in an action in the nature of *quo warranto* to try defendant's title to the office of clerk of the Superior Court of Edgecombe county. In 1874, under the provisions of an act providing for the election of a judge of the second judicial district, Lewis Hilliard was elected to that office and was duly commissioned by the governor as judge. At the time of the passage of the act in question the office named was held by William A. Moore, who had been commissioned to fill a vacancy in a term to expire in 1878. Said Hilliard entered upon the performance of the duties of the office and was recognized as judge. A vacancy occurring in the office of clerk of the Superior Court of Edgecombe county on the 1st of October, 1874, he appointed defendant to fill the vacancy, and defendant duly qualified. On the 17th of September in the same year, said Moore, claiming to exercise the duties of the judicial office, appointed relator to the position of clerk. By the statute the office of clerk in case of vacancy to be filled by the judge of the second judicial district. After-

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ward the act under which Hilliard was elected was declared to be unconstitutional and Moore to be entitled to the office. Such other facts as are material appear in the opinion.

Smith & Strong, Howard & Perry and John L. Bridgers, Jr., for appellant.

Fowle and Johnston, for relator.

READE, J. By reason of the failure of the person elected by the people to qualify, there was a vacancy in the office of Superior Court Clerk for Edgecombe county for the term of four years. The Constitution provides that the judge of the Superior Court should fill such vacancy.

Judge Moore had been the judge for several years ; but in the opinion of the General Assembly his term had expired ; and an act was passed ordering an election by the people for judge ; and under that act Judge Hilliard was elected and qualified and took possession of the office, and held it, exercising all the duties and business of the office until he was ousted under a decision of this court declaring the act under which he was elected unconstitutional. So that it is now clear, that for all the time from his election, qualification and induction into office until he was ousted under the decision of this court Judge Hilliard was not the rightful judge, but he was the judge in fact.

While Judge Hilliard was the acting judge, it was notified to him by the County Commissioners that there was a vacancy in the clerkship ; and he filled the vacancy by the appointment of the defendant. The commissioners also notified Judge Moore of the vacancy, and he appointed the relator. The defendant exercised the duties of the office until Judge Hilliard was ousted, without interruption. When Judge Moore resumed the office his appointee, the relator, claimed the clerkship, and Judge Moore decided in his favor and the defendant appealed.

The question is, what was the force and effect of the appointment of the defendant by Judge Hilliard ? Was the appointment valid for any purpose, or for any time ? If it was, then was it for the whole vacant term ? Or only for such time as Judge Hilliard should be in ? Or only until he, the defendant, could be ousted by direct proceedings against him ? Probably the whole inquiry can be covered by the question : Is the appointee of a *de facto* officer a rightful officer ? Or is he only an officer *de facto* like his appointor ? The burden of the very full argument for the relator, was to show that while the defendant was an officer and his acts valid as to the public and third persons, yet, in a direct pro-

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ceeding against him, as this is, he cannot set up his wrongful appointment in support of his claim to the office. This is unquestionably true, supported by all the authorities, if we admit that the defendant is a *de facto* officer. But that is the very question in dispute. Why is the defendant a *de facto* and not a *de jure* officer? When the defendant is asked "by what authority do you hold the office?" he answers, by appointment of the judge of the Superior Court. And when it is replied, but that judge was only a judge *de facto*; the defendant rejoins, that may be so; but all his necessary official acts were valid as to the public and third persons; my appointment was a necessary official act, and, therefore, valid; and I became not a wrongful usurper, not merely a *de facto*, but a rightful officer; just as rightful as any judgment which he rendered or any act which he did.

I scarcely think it necessary to cite authorities to show the distinction between mere usurpers and officers *de facto* and *de jure*. A usurper is one who takes possession without any authority. His acts are utterly void unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defense in a direct proceeding against himself. A *de facto* officer is one who goes in under *color* of authority — as Judge Hilliard in this case, who went in under an election by the people, which was held by a valid act of Assembly — or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons, but he may be ousted by a direct proceeding. A *de jure* officer is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid and he cannot be ousted.

The only difference between an officer *de facto* and an officer *de jure* is, that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other.

The decisions in our own court may be found in *Burke v. Elliott*, 4 Ired. 855; *Gilliam v. Reddick*, id. 368; *Commissioners, etc. v. McDaniel*, 7 Jones, 107; *Swindell v. Warden*, id. 575; *Keeler v. Newbern*, Phil. 505; *Culver v. Eggers*, 63 N. C. 630; *Ellis v. Deaf and Dumb Asylum*, 68 id. 423. And in *State v. Carroll*, lately decided in Connecticut and reported in 12 Am. Law Reg. 165, in an elaborate opinion by BUTLER, C. J., the English and American cases are reviewed and

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satisfactory definitions given of mere usurpers, whose acts amount to nothing, and of *de facto* and *de jure* officers, whose acts are alike good so far as the public and third persons are concerned. And we think it may now be considered as settled by our own decisions and by the English and American cases and by the text writers, that there is no difference between the acts of *de facto* and *de jure* officers so far as the public and third persons are concerned. Indeed, we understand that to be admitted in this case to be the rule. But it is insisted that there is this exception — that while *de facto* officers — such as Hilliard was — might appoint an officer, such as the defendant, yet his appointee could not be more than he was, a *de facto* officer.

If there is or ought to be any such exception, surely it would be found in some case or writer upon the subject, and yet we have not been referred to any, and our own diligent researches have found none. We find but two cases bearing on it, and their weight is against the exception. In *Rex v. Lisle*, in 1738, Goldwire took possession of the office of mayor and nominated Lisle as a burgess. And in *Quo warranto v. Lisle*, the court said there were two questions: “The first was whether Goldwire was mayor *de facto* at the time he made the appointment? The second was whether, if he was, his appointment of Lisle was good?” Now if the court had decided that Goldwire was mayor *de facto*, and that his appointee, Lisle, was not valid, or only valid as a *de facto* appointment, then it would have supported the exception. But the court decided that Goldwire was a mere usurper and not even a mayor *de facto*. And then they decided that Lisle was not a burgess, because his nomination was not by a *de facto* mayor. It is true the court does not say expressly that the appointment would have been good if the mayor had been a *de facto* officer; but is not that a fair inference? And the court said further: “Suppose Goldwire was a mayor *de facto*, yet the appointment was not good, because it was not *necessary* to the preservation of the corporation.” Is not that the same as to say that if Goldwire had been mayor *de facto* and the appointment of Lisle had been necessary, then the appointment was good? So in our case, if Hilliard was judge *de facto*, and the appointment of a clerk was necessary, as clearly it was, then the appointment of the defendant was good. In *Ellis v. Deaf and Dumb Asylum*, the *de facto* board removed Ellis and appointed another as steward, and this court said, “We hold that acts of this *de facto* board, in the discharge of the ordinary duties of the board, are to have the same force and effect as if made by a regular legal board.” 68 N. C. 428. That is decisive of this case.

It is respectful to notice some of the objections to our views:

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1. It is said that the doctrine that the acts of *de facto* officers are valid is founded in public convenience, and that when the reason ceases the rule ought to cease. And that while it would be a great public inconvenience to declare void all the judgments in civil and criminal cases which Judge Hilliard has rendered, and all the other official acts which he did, yet it would be no inconvenience to the public to oust the defendant as clerk and put in the relator. The public convenience can be as well subserved by the relator as by the defendant.

To that there are two objections. In the first place, the authority is that the judge should fill the vacancy. That means that he should fill it full for the whole time and not for a part. In the second place, if the doctrine be true that the appointee of a *de facto* officer is good only so long as the appointor shall be in office, then all the appointments which the defendant has made as clerk must go out with him: — all the magistrates, guardians, administrators, etc., which he has appointed must go out. I may add a third objection: The convenience of the public is not the only reason given for the rule, but the convenience of the public *and* “*third persons*.” The appointees are the “third persons” whose convenience and rights are to be respected. If the defendant in a suit against his debtor had recovered a judgment for \$1,000 before Judge Hilliard, it would be no inconvenience to *the public* if that judgment should be vacated; but it would interfere with the defendant’s rights; and therefore it must stand. And so, when the defendant was induced to accept an office for the public and to take oaths, execute bonds with sureties, incur penalties and obligations and perform labors and incur expenses his rights must be respected.

2. In the second place it is objected that it is contrary to fundamental principles that a *de facto* officer — Judge Hilliard — should have the power to appoint an officer *de jure*; that any but a rightful officer should appoint a rightful officer, that a stream should rise higher than its source; — “who drives fat oxen must himself be fat.”

The error is in supposing that Hilliard makes the appointment. It is the “Judge of the Superior Court” whoever he may be, and however he happens to be judge, and whether rightfully or not. He who is in the office, clothed with its *insignia*, has the *power* of the *office*. And it cannot be maintained that Hilliard had the power to appoint the defendant for only so long a time as Hilliard should act as judge, and that when Hilliard went out the defendant went with him; for Hilliard could make the appointment only according to his authority, and the Constitution is express that “he shall appoint to fill the vacancy until an election can be regularly held.” And there is certainly

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no authority for Hilliard's filling the vacancy in part and Moore in part.

Why should the necessary official acts of *de facto* officers when operating upon a *person* be of less validity than when operating upon a thing? Why is not his appointing to office of the same force and effect as his judgment for money? If he performs the marriage ceremony, is it void? Of course not. At every term of this court we license a number to practice law; if it should turn out that we are only justices *de facto*, are the licenses void?

We are of the opinion that the defendant is rightfully in office until the next regular election.

There is error. This will be certified, etc.

PEARSON, C. J., and SETTLE, J., dissented.

GWATHNEY, appellant, v. CASON.

(74 N. C. 5.)

Statute of frauds — sale of real estate by auction.

At an auction sale of real estate the property was struck off to defendant. No memorandum was signed, but the auctioneer went into his office two hundred yards from the sale and in defendant's absence began to draw a deed. Before the deed was finished he was informed that defendant refused to complete the purchase. *Held*, that the sale was invalid under the statute of frauds.

A PPEAL by plaintiffs from a judgment of nonsuit in an action to recover the purchase-price of real estate claimed to be purchased by defendant. The facts appear in the opinion.

Walter Clark, for appellant.

Gilliam & Pruden, for respondent.

RODMAN, J. The only question presented in this case is, was the contract by defendant to purchase land, "or some note or memorandum thereof, put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized," as is required by the statute of frauds. Bat. Rev., ch. 50, § 10.

The contract was not signed by the defendant personally. It is properly admitted, however, that upon a purchase of land at auction, a signature of the defendant's name by the auctioneer, in the presence of the

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defendant and with his consent, to any writing containing the terms of the sale, and stating him as the purchaser, will suffice. *Oherry v. Long*, Phil. 466.

Whether the auctioneer is authorized to sign the name of a purchaser not in his presence, and at an indefinite time after his bid has been accepted by the fall of the hammer, was discussed by the counsel. There are decided authorities that the signature must be strictly contemporaneous with the sale. *Mews v. Carr*, 1 Hurlst. & Norm. 486 ; S. C., 38 Eng. L. & Eq. ; Browne on Statute of Frauds, §§ 852, a, 353 ; *Smith v. Arnold*, 5 Mason's C. C. 419 ; *Walker v. Herring*, 21 Gratt. 678 ; S. C., 8 Am. Rep. 616 ; *Horton v. McCarty*, 53 Me. 394.

But, without expressing any opinion on this point, we assume that the effect of what Coke wrote is not impaired by the fact that it was written out of the presence of the defendant, and some short time after the bid of the defendant had been accepted.

The case states that immediately after the sale, Coke (the auctioneer) went to his office, about two hundred yards distant from the place of the sale, and began to draw a deed for the land to the defendant, and had proceeded as far as the *habendum*, when he was informed that defendant declined to comply with his bid for certain reasons, which he assigned. The deed was, however, drawn and tendered to defendant on the day of the sale, when he refused to accept it. The case states that a copy of the deed is annexed, but in fact, it is not. It was, however, conceded by counsel, that the deed was in the usual form. We may assume, therefore, that it professed to be made between the plaintiffs and the defendant as parties of the first and second parts respectively ; that it recited the conveyance from Burton to plaintiffs, the sale, the bid of \$486 by defendant and its acceptance by the auctioneer ; the payment of the consideration, and that plaintiffs conveyed the land to the defendant.

Two objections are made to this instrument as a compliance with the statute :

1. Before the sale the auctioneer announced orally its terms. But it does not appear that the terms, which it may be supposed should state the identity of the land, and either expressly or impliedly the estate of the vendor, as in fee or otherwise, whether the sale was for cash, with or without warranty, etc., had ever been put in writing and read or exhibited to the bidders before the sale. Although an auctioneer is authorized by a bidder to sign his name as purchaser to a contract previously written, or to a writing referring to such contract, it is argued that it does not follow that the auctioneer is authorized to write out, after the sale, the terms which he may remember or suppose to have been orally stated

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by him. No authority has been found to extend the agency of an auctioneer so far, and to do so would open the door to the uncertainty and perjury which it was the design of the statute to exclude. This objection is sustained by the cases above cited. We conceive it, however, unnecessary to express any opinion on it, and state it merely to show that it has not escaped our notice.

2. Granting that Coke had authority as agent of the defendant, not only to sign defendant's name to a contract written and read or exhibited him before the sale, but also to reduce the oral contract into writing after the sale; yet what Coke wrote did not contain or profess to contain *all* the material terms of the contract, and did not profess to be written, and was not in fact written, as agent of the defendant or with any intent to bind him, and consequently it did not contain defendant's signature to a written contract in compliance with the statute. We think this objection a good one. If it were conceded that the defendant had no right to revoke the presumed agency of Coke, and that Coke had a right, notwithstanding the refusal of defendant to comply with his bid, made known to him when he had reached the *habendum* clause in the deed he was drawing, to go on and finish his draft, yet it must be observed that the completed draft would not necessarily or usually contain *all* the material terms of sale. In executing a contract for the sale of land, it is held in this State that it is the duty of the vendor to prepare and tender the deed of conveyance. *Christian v. Nixon*, 11 Ired. 1; *Hardy v. McKesson*, 7 Jones, 567. In the performance of this duty, Coke, as the agent of the plaintiffs, prepared the draft of a deed. The instrument when perfect was not to have been, or need not to have been signed by defendant. It was to be the act and deed of the plaintiffs alone. Consequently it did not contain any words to charge the defendant. When finished it would not contain *all* the material terms of the contract of sale, as to comply with the statute it must. *Boydell v. Drummond*, 11 East, 142; 10 Paige 526; 13 Metc. 385. For example, it would usually recite that the consideration had been received, although in fact a credit had been given for it. But however it may be in the case of auction sales not within the statute, where the bidder is bound from the fall of the hammer, yet in the case of sales of land which are within the statute, we consider that the bidder cannot be bound until his signature is affixed to the contract of sale. This may be done by the auctioneer or his clerk immediately upon the fall of the hammer; but until it is done, the bidder must have a *locus penitentiae*. Otherwise he is bound without his signature, contrary to the statute. *Pike v. Balch*, 38 Me. 302.

It is needless to say that if the finished draft would not have bound the

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defendant, a draft which stopped at the *habendum* would not. The writing up to that point clearly did not profess to contain all the material terms of the contract of sale. It is the office of the *habendum* to state with precision the quantity of the estate conveyed. It may enlarge or limit or qualify the estate granted in the premises, though it cannot be absolutely repugnant to it. Then follow the covenants for title, etc., if any have been contracted for. All these usual provisions in a contract are absent from the draft which Coke had written. There was clearly no written contract of sale; that is, no writing containing expressly or by implication all the material terms of the alleged contract signed by the party to be charged, or by his agent lawfully authorized thereto.

Our conclusion is supported by numerous authorities. *Stokes v. Moore*, 1 Cox, 219; *Parkhurst v. Van Cortland*, 14 Johns. 15; *Givens v. Calder*, Den. 171; *Morton v. McCarty*, 53 Me. 894; *Mews v. Carr*, 88 Eng. L. & Eq. 858; *Horton v. Dean*, 18 Metc. (Mass.) 885.

The cases cited by plaintiff's counsel are not cases of sale by auction, and hence have no application.

PER CURIAM.

Judgment affirmed.

STATE V. MOONEY, appellant.

(74 N. C. 98.)

Pardon — does not relieve from costs.

Under a statute providing that "every person convicted of an offense shall pay the costs of the prosecution," held that a pardon would not relieve from liability for costs.

APPEAL by defendant from a judgment granting a rule to show cause why execution should not issue for costs. The facts fully appear in the opinion.

R. O. Badger, for appellant.

T. L. Hargrave, Attorney-General, for the State.

BYNUM, J. At the Spring Term, 1875, of the Superior Court of Rutherford county, the defendant, Mooney, was indicted, submitted for an assault and battery upon Elias Carrier, and was by the court sentenced

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to one month's imprisonment in the county jail, and judgment given was against him for the costs of the prosecution. Before his term of confinement had expired, the defendant obtained an unconditional pardon from the governor of the State, and was discharged from jail without having paid the costs. At the instance of the solicitor, a rule was taken on the defendant, returnable to the next term, to show cause why execution should not issue for the costs. In answer to the rule, he set forth his said pardon and pleaded the same as a discharge from the payment of the costs. His Honor held that such was not the effect of the pardon, and ordered that the execution do issue; and the defendant appealed to this court. There is no error. By Art. III, § 6 of the Constitution, the governor is invested with power to grant reprieves, commutations and pardons, after conviction for all offenses except in cases of impeachment. In *The State v. Underwood*, 64 N. C. 599, it was held that where the pardon is pleaded after verdict and before judgment, it will discharge the defendant from the costs. How it would be if the pardon had been granted after judgment, was left an open question, and it is now presented for our decision.

The costs and fees in criminal prosecutions are regulated by statute. Bat. Rev., ch. 105, and the acts of 1873-'74, ch. 175. It is expressly provided in ch. 33, § 80, Bat. Rev., that "every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of the prosecution."

The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to receive them. The judgment, though nominally in the name of the State, is, in effect, in favor of those performing services in the case for which fees are given as a compensation. An absolute pardon discharges a fine imposed, because that goes to the public, and the governor represents the public, but the costs belong to private persons, and the pardon can no more discharge the costs than it can discharge a debt due by the defendant to a third person. In *Holliday v. The People*, 5 Gill. 214, the defendant was convicted and sentenced to thirty days' imprisonment and \$100 fine. He was afterward pardoned by the governor, and it was held that the fine was thereby discharged, but that the prisoner was not released, either from the payment of the costs incurred by him, or the costs of the prosecution. So in *Estep v. Lacy*, 35 Iowa, 419; S. C., 14 Am. Rep. 498, an action of replevin was brought against the sheriff for seizing the property of the plaintiff by virtue of an execution for costs in a case of the State of Iowa against the plaintiff. The plaintiff alleged that he had received a full pardon from the governor, and that this operated as a remission of the judgment for

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fine and costs. But the court held that although the costs follow the conviction as a necessary incident, yet they constitute a fund distinct from the fine, and are eventually due the witnesses and the various officers of the law.

In *Rowe v. The State*, 2 Bay. 565, one Kelly had been convicted of crime and fined by the court £50, of which one-half went to the informer. The sheriff who had the execution for the fine, being called on by a rule to show cause why the money had not been collected and paid over, produced the governor's pardon for the whole, as well for the moiety which went to the informer as for the other moiety which went to the State. It was, however, held by the court that the governor had no right to remit any fine or forfeiture specifically appropriated, and that the fees due the officers of the court were vested rights by law as much as the moiety of the fine to the informer, and equally beyond the governor's power of remission.

This is but an affirmance of the principles of the common law, which allows the king the right of pardoning forfeitures, etc., but not so as to affect private rights vested in third persons by law. 2 Durn. & East. 569; 5 Co. 51; 3 Inst. 238. Also 46 Penn. 446; 8 Black. 229 2 Whart. 440.

PER CURIAM.

Judgment affirmed.

HEILIG v. LEMLY, appellant.

(74 N. C. 250.)

Judgment — assignment to sheriff.

A sheriff neglected to enforce an execution until after it was spent, and then paid the amount due thereon, and took an assignment for his own benefit to a third person. *Held*, not to extinguish the judgment, and that an alias execution might issue.

A PPEAL by defendants from an order allowing a motion to issue an alias execution.

Plaintiffs recovered judgment against defendants' intestate and issued execution thereon to the sheriff of Rowan county. The execution was

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spent while in the hands of the sheriff who neglected to collect it. Thereupon the sheriff paid to plaintiffs the amount of the execution before the same was returned, and plaintiffs, at his request, assigned the same to his son. The motion made herein was for leave to issue an execution for the collection of the judgment for the benefit of the son. Defendants opposed the motion on the ground that there was no valid assignment to the son, and that if there was an assignment it was under circumstances rendering it void as against public policy.

McCorkle & Bailey, for appellants.

Battle, Battle & Mordecai, and *J. S. Henderson*, for respondents.

RODMAN, J. The question is whether a sheriff who has made himself liable to a plaintiff by his negligent delay in collecting an execution, and who pays off the debt in his own exoneration and takes an assignment from the plaintiff to a third person in trust for himself, has thereby extinguished the judgment, so that he cannot have an alias execution issued to another officer upon it?

The cases cited by the learned counsel for the defendants from New York do certainly establish that, in that State, upon grounds of public policy, the judgment is absolutely extinguished. *Reed v. Pruyn*, 7 Johns. 426; *Sherman v. Boyce*, 15 id. 443; *Bigelow v. Provost*, 5 Hill, 566, and others which may be found cited in a note to Herman on Executions, 205. Nor is this doctrine confined to New York. It is so held in Alabama: *Roundtree v. Weaver*, 8 Ala. 314; *Boren v. McGehee*, 6 Port. (Ala.) 432; *Crutchfield v. Haynes*, 14 Ala. 49; in Tennessee, *Smith v. Herman*, 1 Cold. 141; but see *Lintz v. Thompson*, 1 Head, 456; in Missouri, *Garth v. Campbell*, 10 Mo. 154; in Maine and Massachusetts, unless the sheriff takes an assignment from the plaintiff, the judgment is extinguished, but if he does, it is not. *Whittier v. Heminway*, 22 Me. 238; *Allen v. Holden*, 9 Mass. 133; *Dunn v. Snell*, 15 id. 481. So in Georgia, *Arnett v. Cloud*, 2 Ga. 53; and perhaps in some other States.

The foundation of all these cases seems to be that of *Reed v. Pruyn*. In that case the sheriff having a *ca. sa.* against Staats, under which Staats was arrested, procured him and Pruyn to confess a judgment in favor of the plaintiff for a larger sum, and the sheriff paid the amount of the execution to the plaintiff. In a few days he took out a *ca. sa.* on the judgment confessed by Staats and Pruyn, and took their note for a still larger sum, and gave them a receipt for the amount of the first judgment. Afterward the sheriff advertised the property of Pruyn and

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Staats for sale under an execution upon the judgment confessed, and they moved to set aside the execution, and for an entry of satisfaction on the judgment confessed. The court granted the motion, and there can be no doubt was right in doing so.

A sheriff who has an execution against a defendant and as the price of indulgence takes from him a judgment confessed, or a note, for a larger sum, is guilty of oppression and of a breach of official duty, and on grounds of public policy such judgment confessed, or note, must be held void, notwithstanding the sheriff has paid the plaintiff in the original judgment the amount of his claim. And *a fortiori* any acts of the sheriff after he had acquired his interest, under an execution whether issued upon the original judgment confessed, were in like manner void as to the defendant in the execution. This last proposition has long been settled. Bat. Rev., ch. 25, Coroner; ch. 106, Sheriff; *Brown v. Jones*, 3 Ired. 25; *McLeod v. McCalf*, 3 Jones, 87; *Stewart v. Rutherford*, 4 id. 483. And the first we conceive to be equally clear upon general principles. See, also, Bat. Rev., ch. 106, § 17.

KENT, J., in delivering the opinion of the court (after citing the cases of *Waller v. Weedale*, Noy. 107; *Langdon v. Wallis*, Lutw. 587; *Speake v. Richards*, Hob. 206, and *Ward v. Hauchet*, 1 Keb. 551), says: "The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court should not use its process as the means of making unequal bargains, and taking undue advantage. The facts in this case have the appearance of an instance of gross abuse."

He concludes by saying, "I am happy therefore that the sheriff will be driven to seek his remedy upon the note, when the legality of the increase of the original debt will be open to further investigation."

We think that in the subsequent cases in New York, and in the others elsewhere that have followed this case, the opinion of the eminent judge has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case has been converted into a general and arbitrary rule.

In the present case, the sheriff having an execution against the defendant paid it to the plaintiff in his own exoneration and took an assignment on the execution to his son, whether as a trustee to himself, or as a gift to the son, is not material. He now moves that an alias execution

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may issue to his successor in office, for his benefit. There has been no oppression as there clearly was in the case of *Reed v. Pruyn*, and the debt has not been increased.

We are at a loss to conceive what public policy will be violated if the motion is allowed.

It is said that if the sheriff can escape amercement by paying an execution which it was his duty to collect, he will be induced to delay enforcing executions, and creditors may be injured. The creditor cannot be injured if the debt is paid. And it cannot be a wrong to the debtor if a sheriff who, relying perhaps on his promise to pay the money by the return day, has made himself liable by his indulgence, is allowed after payment to stand in the position of the creditor. If public policy forbids such payments by sheriffs, and for that reason the judgment is extinguished, it would seem that the same principle would forbid any recovery by the sheriff of the money so paid by him. But the principal case we have commented on, holds that the sheriff might sue upon the note which he had taken, and recover what might be just.

It is also said in *Roundtree v. Weaver*, that the sheriff in an action against the defendant can recover the money paid for his benefit. And in *Lintz v. Thompson* it is said that if the sheriff is compelled to pay the debt by judgment of a court, there is an implied transfer of the plaintiff's debt to him. These cases thus acknowledge that it would be inequitable for a defendant to receive the benefit of the sheriff's payment, and refuse to reimburse him. It is true that the defendant did not previously request the sheriff to pay the debt, and that in general no one can make himself the creditor of another by officious service, or by officiously paying a debt for him. But where a sheriff, at the express or presumed request of a defendant in execution, indulges him so that the sheriff is compelled to pay the debt, there is a clear equity for reimbursement. The acceptance of the discharge of the original debt by the defendant in execution, may be considered as a ratification of the sheriff's act, and as equivalent to a prior request. It is somewhat like a case where one accepts a draft about to be protested for non-acceptance, for the honor of the drawer. If this equity for reimbursement be admitted as a foundation for an action, why is it illegal and against public policy for the sheriff to take an assignment of the execution, which gives him no more than he would have a right to recover? The form of the recovery is not an essential part of the equity, and there is no reason why the sheriff should be put to the circuitry of an action.

It has been seen that in Maine and Massachusetts it is held that where the sheriff takes an assignment of the judgment from the plaintiff in

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execution, the judgment is not extinguished. The decisions in those States support our decision in the present case. We think also that they imply that it is not against public policy for a sheriff to pay off a debt in his own exoneration; for if it were, an assignment would not be sustained.

We concur with the judge below, that the motion should be allowed.

PER CURIAM.

Judgment affirmed.

STATE V. GRAHAM, appellant.

(74 N. C. 646.)

Duress'—criminal evidence.

An officer, who had arrested a prisoner charged with larceny, compelled him to put his foot in a track found near where the larceny was committed and testified as to the result of the comparison. *Held*, that the evidence was not procured by duress and was admissible.

APPEAL by defendant from a judgment entered upon a verdict of conviction at the trial of an indictment for larceny.

Corn growing in the field of one Ricketts, by whom defendant was employed, had been stolen and fresh foot-tracks made by a single person was discovered in the same field leading from and toward the premises where defendant lived. Defendant was arrested and taken to the field and the officer having him in charge compelled him to put his foot in one of the tracks. At the trial the officer testified that the tracks in the field fitted the boots which defendant wore. Such other facts as are material appear in the opinion.

Busbee & Busbee, for appellant.

T. L. Hargrove, Attorney-General, for the State.

RODMAN, J. The first exception is, because the judge permitted the officer who had the prisoner in custody to testify, that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *State v. Jacobs*, 5 Jones, 259, is cited.

The object of all the evidence is to elicit the truth. Confessions which

are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury and fit for their consideration.

Evidence of this sort is called by the civilians "real evidence," is always admissible and is of greater or less value according to the circumstances. In *Best on Evidence*, § 183, the following instances of its value are given. "In a case of burglary, where the thief gained admittance into the house by opening the window with a penknife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the wound consisted of a part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber on the face with a key, a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception however is that the officer made the prisoner put his foot in the track in order to test the resemblance. It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held, that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were will be received, provided the goods were found at the place described. *Reg. v. Gould*, 9 C. & P. 364; *Duffy v. People*, 26 N. Y. 588; *White v. State*, 3 Heisk. 838; *Selvidge v. State*, 30 Tex. 60.

The fact of the goods being found in the place described, proves that he knew they were there, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence *Roscoe's Cr. Ev.* 211; *R. v. O'Donnell*, 7 C. & P. 138 (32 E. C. L. R.); *R. v. Kinsey*, id. 447; *R. v. Burgess*, id. 488; *R. v. Rooney*, id. 515

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If an officer who arrests one charged with an offense had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found? If, when a prisoner is arrested for passing counterfeit money, the contents of his pockets are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter*? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face: May not the court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime?

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during his trial?

We conceive that these questions admit of but one answer, and that is one consistent with the general practice.

We concur with the judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoe would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

PER CURIAM.

Judgment affirmed.

State v. Neely.

STATE v. NEELY, appellant.

(74 N. C. 425.)

Criminal evidence — assault with intent to commit rape.

A negro, seeing a white woman passing alone through a piece of woods, gave chase to her, crying out to her several times to stop. She ran and he did not overtake her until she was out of the woods and in sight of a dwelling-house, when he ran back into the woods. *Held*, sufficient to sustain a conviction for assault with intent to commit rape (RODMAN AND BYNUM, JJ., dissented).

APPEAL by defendant from an order denying a new trial after a verdict of conviction upon an indictment for an assault with intent to commit a rape. According to the evidence given by the prosecutrix, a white woman, she was walking alone along a wood leading to the house of her brother-in-law, where she resided, and which for about a quarter of a mile ran through a piece of woods. While passing through these woods she heard the prisoner, a colored man, cry out to her to stop, and saw him running after her at the distance of about seventy yards. She immediately ran as fast as she could and was pursued by the prisoner, who cried out to her three times to stop and was rapidly approaching her when she emerged from the woods and came in sight of the house of her brother-in-law. The negro immediately desisted from pursuit and ran back into the woods. He was shortly afterward captured. This was the only material evidence, and the court below charged thereon that it was the duty of the State to prove all the essential facts constituting the crime beyond a reasonable doubt, and that if the jury had reasonable doubt, they must acquit. As to the assault, the court charged that if the prisoner pursued the prosecutrix against her will, with the intent violently to take hold of her person, and caused her to flee, and then continued to pursue her, this would be an assault, and that if they found that the prisoner committed such an assault with the intent carnally to know the person of the prosecutrix violently and against her will, he would be guilty, and they must so find; otherwise they would acquit. To this charge the prisoner excepted.

Shipp & Bailey, for appellant.

T. L. Hargrove, Attorney-General, for the State.

PEARSON, C. J. That the prisoner, upon the facts set out in the statement of the case, committed an assault is not an open question.

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State v. Davis, 1 Ired. 125 ; *State v. Rawles*, 65 N. C. 884 ; *State v. Vannoy*, id. 532.

This, it would seem, was the only point relied on by the counsel of the prisoner in the court below. We are led to the inference, that the points as to there being no evidence of the intent to commit a rape was not taken in the court below, by the fact that in stating the case his Honor assumes that the intent charged was fully proved and given up on the trial, and contents himself with setting out "there was other testimony bearing on the intent with which he pursued the prosecutrix, which it is not necessary to set forth in detail." Clearly had the point been made, that there was *no evidence* fit to be left to the jury as to the intent charged in the indictment, his Honor would have seen that it was necessary to set forth in detail the other testimony, "bearing on the intent with which he pursued the prosecutrix." However this may be, giving the prisoner the benefit of the rule "what does not appear does not exist," and relieving him from the rule "the appellant must show error and intendments are to be taken against him," we will consider the case as presenting the question : Do the facts and circumstances set out amount to any evidence fit to be left to the jury as to the intent charged ? Or was the matter of intent left so much in the dark as to make it the duty of the judge to have instructed the jury to have acquitted the prisoner of the criminal intent charged ?

A majority of the court are of the opinion that there was evidence to be left to the jury as to the intent charged. For my own part I think the evidence plenary, and had I been on the jury would not have hesitated one moment.

I see a chicken cock drop his wings and take after a hen : my experience and observation assure me that his purpose is sexual intercourse, no other evidence is needed.

Whether the cock supposes that the hen is running by female instinct to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt, as for instance if she is a setting hen, and "makes flight" not merely amorous resistance. There may be evidence from experience and observation of the nature of the animals and of male and female instincts, fit to be left to the jury, upon all of the circumstances and surroundings of the case, was the pursuit made with the expectation that he would be gratified voluntarily, or was it made with the intent to have his will against her will and by force ? Upon this case of the cock and the hen, can any one seriously insist that

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a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female instincts.

Again ; I see a dog in hot pursuit of a rabbit ; my experience and observation assure me the intent of the dog is to kill the rabbit ; no doubt about it, and yet, according to the argument of the prisoner's counsel, there is no evidence of the intent.

In our case, when the woman leaves the railroad and starts for her home and is unaccompanied, to pass through woodland for one-fourth of a mile, a negro man calls to her stop ; he is at the distance of seventy-five yards ; she with female instinct, from the tone of his voice, looks, etc., sees his purpose and runs as fast as she can through the woodland and makes the head of the lane, in sight of the house, before he is able to catch her ; he pursues to the head of the lane, and then flees and attempts to escape in the woods.

It is said in the ingenious argument of the counsel of the prisoner, his intent may have been to kill the woman, or to rob her of her shawl or of her money, and if the jury cannot decide for which of these intents he pursued her, they ought to find a verdict for the defendant. The fallacy of this argument is, I conceive, in this : it excludes all of the knowledge which we acquire from experience and observation as to the nature of man. This is the corner-stone on which the institution of trial by jury rests. To say that a jury are not at liberty to refer to their observation and experience, when a negro man under the circumstances of this case pursues a white woman, starting at, say seventy-five yards and gaining on her and being near when she gets in sight of the house, when he stops and flees into the woods, is, as it seems to me, to take from a trial by jury all of its recommendations.

Our case particularly called for the observation and experience of the jurors as practical men. The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was to kill or rob her, so the intent must have been to have sexual intercourse, and the jury considering that he was a negro, and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house, and the instinct of nature as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to find that the intent was to commit a rape.

RODMAN AND BYNUM, JJ., dissented.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

MUNSON v. BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

(120 Mass. 81.)

Jurisdiction — bankrupt law — attachment.

An action, begun in a State court by attachment of the property of a corporation against which, pending the action, but not within four months after the attachment was made, proceedings in bankruptcy have been instituted, will not be dismissed on motion of the assignees in bankruptcy of the corporation, for want of jurisdiction.

CONTRACT. Writ dated March 1, 1870. On the same day, the real estate of the defendant in the county of Suffolk was attached. The declaration contained four counts. The first three counts were for breach of alleged contracts between the plaintiff and the defendants for services and materials in building the defendant's railroad and filling its flats. The fourth count was on an account annexed for a balance of \$878,812.23; the items of this account embraced all the causes of action in the preceding counts. The answer contained a general denial, and also alleged that the plaintiff's charges were excessive; that all the services rendered and materials furnished had been fully paid for; and that all the property of the defendant had been placed in the hands of receivers under the orders of this court.

In October, 1870, proceedings in bankruptcy were begun against the defendant in the District Court of the United States for the District of Massachusetts, and it was adjudged a bankrupt; and in March, 1871, Charles S. Bradley, George M. Barnard and Charles R. Chapman were

 Munson v. Boston, Hartford and Erie Railroad Co.

appointed assignees, and the proceedings in bankruptcy are still pending. At September term, 1872, of this court, on motion of the plaintiff, an order was passed requiring the plaintiff to give notice to the assignees to appear and defend the action. Service of this order was made upon Bradley on October 18, 1872 and upon Barnard, October 21, 1872. No service was ever made on Chapman, he being out of the jurisdiction. On June 12, 1874, the Stat. of 1874, ch. 834, entitled "An act to dissolve the Boston, Hartford & Erie Railroad Company," was passed by the legislature. No claims for trial by jury having been filed in this action, it was set down by the court to be heard on April 22, 1875, and at the time for hearing, the assignees not appearing, the plaintiff moved for a default, and a qualified judgment, to be enforced against the property attached; whereupon Barnard appeared specially, and caused to be read and filed in the case, at the same time, a paper objecting to the jurisdiction of the court. On May 17, 1875, Barnard and Bradley appeared specially, and filed a motion to dismiss on the ground of want of jurisdiction. No other appearance has been made by the assignees, or any of them.

At the hearing on this motion, the facts above set forth appeared of record or were admitted. DEVENS, J., overruled the motion to dismiss, and reported the case to the full court for the determination of the question whether the motion to dismiss should have been overruled.

J. C. Gray, Jr., for the assignees in bankruptcy, cited *Harrison v. Sterry*, 5 Cranch, 289, 301; *Payson v. Payson*, 1 Mass. 288, 290; *Davenport v. Tilton*, 10 Metc. 320, 325 et seq.; *Clifton v. Foster*, 103 Mass. 233; *Foster v. Ames*, 1 Low. 318; *Houston v. City Bank*, 6 How. 486; *Ray v. Norseworthy*, 23 Wall. 128; *Sampson v. Clark*, 2 Cush. 173; *Bradford v. Rice*, 102 Mass. 472; *Davenport v. Tilton*, 10 Metc. 320; *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 id. 227; *Stockwell v. Silloway*, 113 Mass. 382; *Bates v. Tappan*, 99 id. 376; *Johnson v. Collins*, 116 id. 391; *Second Bank of Louisville v. National State Bank of Newark*, 10 Bush, 367, 380; *In re Vogel*, 7 Blatchf. C. C. 18; *In re Clark*, 9 id. 372; *In re Mallory*, 6 Bank. Reg. 22, 82; *Mays v. Fritton*, 20 Wall. 414; *Scott v. Kelly*, 22 id. 57, and *Doe v. Childress*, 21 id. 642.

D. Foster & D. E. Ware, for plaintiff.

GRAY, C. J. The attachment in this case having been made more than four months before the commencement of the proceedings in bankruptcy, the lien created thereby is preserved by the bankrupt act, and

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the appropriate way of ascertaining the amount of this lien, and of making it effectual, is by judgment in this action. U. S. Stat. 1867, ch. 176, § 14; U. S. Rev. Stats., § 5044; *Doe v. Childress*, 21 Wall. 642; *Ray v. Wight*, 119 Mass. 426; S. C., 19 Am. Rep. 333.

Even in the case of an individual bankrupt, such an action is not to be dismissed upon the commencement of bankruptcy proceedings, but may either be stayed to await the determination of the question of the debtor's discharge in the court of bankruptcy, or, by leave of that court, proceed to judgment for the purpose of ascertaining the amount due to the plaintiff and provable in bankruptcy. U. S. Stat. 1867, ch. 176, § 21; U. S. Rev. Stats., § 5106. In the case of a bankrupt corporation, the bankrupt act does not restrain a creditor, who has not proved his claim in bankruptcy, from prosecuting the action to judgment, for the purpose of enforcing his lien upon the property attached, or of charging officers or stockholders who are liable for the debts of the corporation. *Chamberlin v. Huguenot Manuf. Co.*, 118 Mass. 582; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656.

Although the United States court, sitting in bankruptcy, has jurisdiction to ascertain and liquidate the amount of the lien, and to order the property to be sold discharged of all incumbrances, yet it may elect not to do so; and if, before any proceedings taken in that court for that purpose, this action should be dismissed, the lien created by the attachment would be charged, and all benefit of it lost. U. S. Stat. 1867, ch. 176, §§ 1, 14, 20, 25; U. S. Rev. Stats., §§ 4972, 5063, 5066, 5075; *Ray v. Norseworthy*, 23 Wall. 128; *Foster v. Ames*, 1 Low. 813; *Olifton v. Foster*, 103 Mass. 233; *Braley v. Boomer*, 116 id. 527; *Fickett v. Durham*, 119 id. 159.

This report does not require us to consider what effect a judgment for the plaintiff may have, as a merger of his cause of action, or upon his right to prove in bankruptcy. The only question before us is whether the action should be dismissed for want of jurisdiction, and for the reasons above stated we are of opinion that it should not be dismissed.

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WHITCOMB'S CASE.

(120 Mass. 118.)

Punishment for contempt by municipal board.

The common council of a city has no power to commit and punish for contempt; and a statute which undertakes to confer such authority is unconstitutional and void. (*See note, p. 567*).

HABEAS CORPUS, issued March 18, 1876, upon the petition of Ephraim D. Whitcomb, representing that he was unlawfully imprisoned and restrained of his liberty in the common jail in Boston, by John M. Clark, sheriff of the county of Suffolk; that the pretense of said imprisonment and restraint was a warrant or order purporting to have been issued by the common council of the city of Boston, a copy of which was annexed to the petition; that the warrant or order had been issued improvidently and in violation of law. The order of the common council, signed by the president thereof, was as follows:

“Whereas Ephraim D. Whitcomb, having been duly summoned to testify before a special committee of the common council, appointed with full powers to investigate and report upon any and all charges against members of the common council preferred in connection with action and votes, or either, in the original location or relocation of the public vegetable market by the city council, and also to inquire and report whether any money or other valuable consideration was paid, given or received, and if so by whom, for services, votes or influence, or otherwise, in the matter of said location or relocation, unlawfully and unreasonably refused to answer a certain question lawfully propounded by the said committee, to wit, the question, ‘Who was that person?’ and did state in connection with said refusal that he did not refuse because the answer would criminate him, but did refuse for business reasons; and having been duly arraigned at the bar of the common council and heard the report of said committee setting forth said refusal, and by the order of the council inquired of whether he had any excuse to offer for refusing to answer said question propounded by said committee, and whether he was ready to appear before said committee and answer said question, in contempt of the authority of the common council did give unsatisfactory answers to the questions propounded, and did and does unlawfully persist in his refusal to appear before said committee and answer said question propounded by said committee: it is therefore

“Ordered, that the said Ephraim D. Whitcomb be committed to the

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custody of the city messenger, to be by him confined in the common jail of the county of Suffolk, for the term of twelve days, unless he shall sooner signify his willingness to appear and purge himself of his contempt, and answer the question propounded by the said special committee of the common council, which he refused to answer; and for the commitment and detention of said Ephraim D. Whitcomb, this order shall be sufficient warrant; and it is further ordered, that whenever the said Ephraim D. Whitcomb, while in custody under the foregoing order, shall inform the city messenger that he is willing to answer said question propounded by said committee, and to appear before said committee for that purpose, it shall be the duty of the city messenger to take said Ephraim D. Whitcomb immediately before the common council and hold him subject to its order."

On this warrant was indorsed the return of the city messenger, to the effect that he had on March 9, 1876, conveyed Ephraim D. Whitcomb to the said jail in Boston, and delivered him to the keeper thereof, with an attested copy of the order and his return indorsed thereon.

The return of the sheriff, who was also keeper of the common jail, to the writ, justified by virtue of the order of the common council.

Hearing before MORTON, J., who reserved the questions arising on the above papers for the consideration of the full court, and admitted the petitioner to bail in the sum of \$1,000.

H. J. Boardman, for petitioner.

J. P. Healy & H. W. Putnam, contra.

GRAY, C. J. By the twelfth article of the Declaration of Rights prefixed to the Constitution of the Commonwealth, "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land."

This article is a reenactment of the provision of Magna Charta, ch. 29, that "no freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."

In Massachusetts, as in England, the power to commit for contempt has always existed in the higher courts of justice, and is part of the law of the land, within the meaning of Magna Charta and of our Declaration

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of Rights. Bac. Abr., Courts, E.; *In re Fernandes*, 6 H. & N. 717, and 10 C. B. (N. S.) 3; *In re Ohles*, 22 id. 157; *Cartwright's case*, 114 Mass. 230, and authorities cited.

Justices of the peace are recognized in the Constitution of the Commonwealth as exercising a part of the judiciary power, and are for some purposes courts of record. Const. Mass., ch. 8, art. 8; *Thayer v. Commonwealth*, 12 Metc. 9. Their authority to punish for contempts, at least so far as is indispensable to the orderly conducting of their business, and especially in the case of the refusal of witnesses, after due summons and payment of their fees, to appear and testify before them, has been generally admitted, and has been regulated by statute from the earliest time of the Commonwealth. Stat. 1784, ch. 28, § 6; Rev. Stats., ch. 85, § 88, and Commissioners' note to § 81; Stat. 1638, ch. 42; Gen. Stats., ch. 120, § 50; ch. 181, §§ 5, 6; *Clarke's case*, 12 Cush. 320; *Piper v. Pearson*, 2 Gray, 120; *State v. Copp*, 15 N. H. 212; *In re Cooper*, 82 Vt. 258.

The constitutionality of the provision, first introduced in the statute of 1838, ch. 42, and re-enacted in General Statutes, ch. 181, §§ 5, 6, giving to masters in chancery and auditors a like power over witnesses, may admit of more doubt. According to the usual practice in chancery, an attachment against a witness for contempt before a master requires an application to the court. *Middleton v. Spericht*, Cary, 80; *The King v. Almon*, Wilmot, 243, 269; 2 Dan. Ch. Pract. (4th Am. ed.) 1178; 78th Equity Rule of U. S. Courts, 17 Pet. lxxiv. A like practice is prescribed by act of Congress in the cases of commissioners to take depositions to be used abroad, and of registers in bankruptcy. U. S. Rev. Stats., §§ 4071-4073, 4999, 5002, 5005, 5006. See, also, *Ex parte Doll*, 7 Phila. 595. So a witness who refuses to be sworn or to testify before a grand jury must be brought before the court to be dealt with. *Heard v. Pierce*, 8 Cush. 338. Yet, as a master or auditor is transacting the judicial business of the court, and is under its authority and control, he may perhaps be intrusted by the legislature with this power. But we have no occasion now to consider that question, nor the validity of the statutes conferring a similar power upon county commissioners, who, though often called a court, and authorized to determine many questions between parties, do not hold their offices by the same appointment or tenure as judges. Gen. Stats., ch. 10, §§ 1, 6; ch. 17, § 14; ch. 181, §§ 5, 6; *Stone v. Charlestown*, 114 Mass. 214, 223; *Morrison v. McDonald*, 21 Me. 550, 556.

Each house of the British Parliament had the largest power to punish every description of contempt of its authority. *Orosby's case*, 8 Wila.

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188; S. C., 2 W. Bl. 754; *Burdett v. Abbott*, 14 East, 1, 5; Dow. 165; *Case of the Sheriff of Middlesex*, 11 A. & E. 273; S. C. *nom. The Queen v. Gossett*, 3 P. & D. 349. But, according to the decisions of most eminent judges, either branch of a colonial legislature has no such power of punishment. *Kielley v. Carson*, 4 Moore's P. C. 63; *Hill v. Weldon*, 3 Kerr's N. B. 1; even for refusal to attend as a witness when duly summoned. *Fenton v. Hampton*, 11 Moore's P. C. 347; or for contempts committed in the face of the house. *Doyle v. Falconer*, L. R., 1 P. C. 328—unless by established usage. *Beaumont v. Barrett*, 1 Moore's P. C. 59; or by express act of the imperial Parliament. *Dill v. Murphy*, 1 Moore (N. S.), 487; *Speaker v. Glass*, L. R., 3 P. C. 560. So in *Ex parte Brown*, 5 B. & S. 280, the Court of King's Bench held that the House of Keys, which was the lower branch of the legislature of the Isle of Man, and had also judicial functions in appeals from the verdicts of juries, had no power to commit for contempt, when acting in its legislative capacity.

It is universally admitted that by the law of England a town or city council had no power, without express act of Parliament, to make an ordinance with penalty of imprisonment, or to commit for contempt of its authority. Grant on Corp. 84–86; PARKE, B., in 4 Moore's P. C. 89; *Barter v. Commonwealth*, 3 Penn. 253.

The British parliament has supreme and uncontrolled power, and may change the Constitution of England, and repeal even Magna Charta, which is itself only an act of Parliament. But in this Commonwealth the legislative, as well as the executive authority and the courts of justice is controlled and limited by the written constitution, and cannot violate the safeguards established by the twelfth article of the Declaration of Rights. *Emery's case*, 107 Mass. 172; S. C., 9 Am. Rep. 22.

In the United States, each branch of a supreme legislature has the same power to commit for contempt as either house of Parliament. Such a power has been adjudged to be inherent in the Federal Senate and House of Representatives, although not expressed in the Constitution. *Anderson v. Dunn*, 6 Wheat. 204. A like power doubtless exists in each branch of the General Court of Massachusetts, and of other State legislatures, which are supreme within their sphere, and not, like the colonial assemblies of Great Britain, created by and subordinate to the national legislature. *Burnham v. Morrissey*, 14 Gray, 226; *State v. Matthews*, 87 N. H. 450; *Falvey's case*, 7 Wis. 630.

But in *Anderson v. Dunn* the court said that "neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. 6 Wheat. 233, 234. To such a subject the

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words of Lord COKE apply with peculiar force: "When authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land." 12 Rep. 75.

At the time of the adoption of the Constitution of the Commonwealth, it was no part of the law of the land that municipal boards or officers should have power to commit or punish for contempts. The second article of amendment of the Constitution, which first conferred upon the General Court "full power and authority to erect and constitute municipal or city governments in any corporate town or towns in this Commonwealth," authorized it to grant to the inhabitants thereof such powers, privileges and immunities, "not repugnant to the Constitution," as it should deem necessary and expedient for the regulation and government thereof; and provided "that all by-laws made by such municipal or city government shall be subject at all times to be annulled by the General Court."

The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge, and subject to the paramount control of the legislature. Neither branch of the city council is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen.

The legislature, in the exercise of the power given it by the Constitution, has vested in the board of aldermen and common council authority to decide upon all questions relative to the qualifications, elections, and returns of their respective members, and might authorize — we are not now called upon to decide whether it has authorized — them to expel members for sufficient cause. Stat. 1854, ch. 448, § 24; *Peabody v. School Committee of Boston*, 115 Mass. 383; *State v. Jersey City Common Council*, 1 Dutch. 536. The legislature may also provide for the punishment, upon indictment and trial in the courts of justice, of any person who, being duly summoned, refuses to appear and testify before any board or tribunal upon a matter which it is authorized by law to investigate or decide. But the legislature cannot delegate to or confer upon municipal boards or officers, that are not courts of justice, and whose proceedings are not an exercise of judicial power, the authority to imprison and punish, without right of appeal or trial by jury.

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The result is that so much of the Stat. of 1863, ch. 158, as undertakes to confer such authority upon either branch of a city council, or upon the selectmen of a town, is inoperative and void, because it is a violation of the Constitution of the Commonwealth, and contrary to the law of the land.

Prisoner discharged.

NOTE.—See *People v. Learned*, 5 Hun, 626. That case was based on the following facts : A commission was created by the concurrent resolution of the two houses of the legislature, for the purpose of investigating the affairs of the canal. An act was subsequently passed providing that in case of the refusal of a witness to obey a subpoena issued by the commission he should be brought before the commission by attachment, and that "the like proceedings shall thereupon be had as if such commission was a court of record, and such witness had been duly subpoenaed to attend before it." The court held that the commission had, under this provision, power to commit a recusant witness for contempt.

LOVELAND V. BURKE

(120 Mass. 139.)

Common carrier — when not liable for injury to goods.

It is competent for a common carrier, in defense of an action for injury to goods, in their delivery, by the breaking of the requisite apparatus, to show a local usage that such apparatus is to be furnished by the consignee of the goods ; and, if such usage is shown, the carrier is not liable for injury to the goods, occasioned by a latent defect in the apparatus furnished by the consignee.

A common carrier, having a hogshead of molasses to deliver, was furnished by the owner with skids wherewith to unload it from his wagon. The skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. *Held*, that the owner could not maintain an action against the carrier for the loss.

CONTRACT against a common carrier between Boston and Somerville, to recover the value of a hogshead of molasses.

At the trial in the Superior Court, before ROCKWELL, J., it appeared that the plaintiffs employed the defendant to transport a hogshead of molasses from Boston to their grocery store in Somerville ; that the defendant did transport it in his wagon to Somerville at a point near their store ; that the plaintiffs then directed him to unload it to and upon the piazza of the store ; that he backed his wagon to within a few feet of the piazza, and skids or wooden supports were then placed from the piazza to the wagon ; that then the parties undertook to roll the hogshead from the wagon to the piazza, and, when it was upon the skids between the wagon and piazza, one of the skids broke, which caused the hogshead to fall and its contents to be destroyed. It further appeared

that the skids were furnished by the plaintiffs, and that the defendant requested the plaintiffs to furnish them, and that the breaking was attributable to the fact that a piece had been sawed out of the under side of the skid which broke.

The defendant offered evidence tending to prove that it was the universal and well-known custom and usage in Somerville and the suburban cities and towns for grocers to keep and furnish skids, whereupon to remove heavy articles from common carriers' wagons to their grocery stores, and for carriers not to furnish skids, and that it was the plaintiffs' duty in this case to furnish the skids ; also that the skids so furnished appeared to him to be suitable, and that the defect, which caused the accident, was not apparent, and in fact was not seen by him ; and requested the judge to instruct the jury, " that if they should find that it was the duty of the plaintiffs to furnish proper skids upon which to receive the hogshead, and that they did furnish skids therefor, which appeared suitable to the defendant, he would not be required to make a critical examination of them, and would not be liable for an accident to said hogshead caused by a defect in them, which he did not see, and which was not ordinarily apparent.

The judge declined to instruct the jury in this form, but did rule and instruct them as follows : " The duty of the defendant was to deliver the hogshead safely on the premises of the plaintiff, using proper means and instruments. The mere fact (if it is a fact) that the usage is that grocers furnish the skids, does not alter the duty of the defendant to deliver the hogshead on the plaintiffs' premises. The carrier, by that fact, and the other fact that the plaintiffs did furnish the skids at the request of the defendant, was not relieved of further duty after the hogshead passed upon the ends of the skids. He was still bound to use proper care in the use of proper skids. He had no right to use insufficient skids, although the skids produced at his request were furnished according to usage by the plaintiffs. He, the defendant, was still bound to use proper care in the use of proper skids. The plaintiffs were not warrantors that the skids were sufficient to carry the hogshead to the sidewalk on the plaintiffs' premises. If there was a latent defect in the skids, known to the plaintiffs and not known to the defendant, and not observable by ordinary skillful observation before using, the defendant would not be liable. The question as to usage, though of some importance, is not decisive of the case, but the previous considerations must also be regarded. The mere fact that the skids were furnished in compliance with usage by the plaintiffs does not alter the period when the delivery is completed. The period of completed delivery by the carrier is the

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same whether the skids are furnished by the plaintiffs or by the defendants.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the rulings and refusals to rule as requested.

W. S. Stearns, for defendant.

B. C. Moulton, for plaintiffs.

AMES, J. The usage which the defendant attempted to prove was not unreasonable in itself, nor was it in contravention of any rule of law. It was not an attempt to establish, for the purposes of this case, any special or peculiar rule of interpretation of terms, conflicting with their recognized and ordinary legal meaning. It was offered merely to prove, as a matter of fact, that there was an established mode of doing a certain business in the locality where the parties reside, so well known to them as to justify the conclusion, that they both expected and understood that the business, which the defendant undertook to do on this occasion, was to be done in that manner. The defendant, upon receiving the goods for transportation, must be understood to have contracted to deal with them according to the regular, known and ordinary course of his business. *St. John v. Van Santvoord*, 25 Wend. 660. His liability to deliver them to the owner in person could be modified by contract, by general usage, or even by his own particular usage, if understood or known by the other party. *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 131. The parties may make any agreement they please as to the time, place and manner of delivery, and in the absence of any express contract, the limits of delivery may be determined by a local usage. *Barnes v. Foley*, 5 Burr. 2711. Thus it has been held that a carrier may show a usage to deliver at certain stopping places only. *Gibson v. Culver*, 17 Wend. 305. A usage, so long established, uniform, and notorious, as to justify the presumption that both parties knew it, becomes a part of the contract, and may determine when the transit is over, and what is a sufficient delivery. That is to say, the extent of the transit may be matter resting altogether in proof; and the course of business at the place of destination, and the usage of carriers at that place, may be controlling ingredients of the contract itself. *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 28 Vt. 176.

The ruling given by the court as to the effect of the alleged usage, if proved, did not meet the exigencies of the case. The jury should have been instructed that if they were satisfied of the existence of a long-continued, established and notorious usage for grocers, in that locality to

furnish the planks or wooden supports for unloading at their shops heavy articles from carriers' wagons, and if the damage in this instance was occasioned by defects in the appliances furnished for that purpose by the plaintiffs, especially if those defects were not so manifest that the defendant saw, or with reasonable attention would have seen them, the action could not be maintained. A usage to furnish the skids must mean suitable and proper skids, capable with reasonable use of sustaining the weight of the articles which were to rest upon them.

But, independently of the question of usage, there is another difficulty in the plaintiffs' case which we find to be insurmountable. It may be conceded that the defendant's obligation to transport the goods to their place of destination included an obligation to unload and deliver them safely, and that ordinarily the transit is not at an end until such a delivery is accomplished. But the place and manner of delivery may always be varied with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility. *Lewis v. Western Railroad*, 11 Metc. 509.

In the case at bar, it is expressly found that the plaintiffs, on the arrival of the goods, and at the request of the carrier, furnished the skids upon which he was to roll the hogshead into their warehouse. He certainly had a right to suppose that they knew whether the skids were sufficient to support its weight. His duty was to deliver the articles as the plaintiffs should direct. If the plaintiffs themselves took part in the delivery, and furnished the skids to be used in the process of unloading, it was equivalent to a direction to him to unload in that manner, or at least to a consent that he should do so. He is entitled to say that he has delivered the goods to the plaintiffs and in accordance with their directions; and it is little short of a legal solecism to say that he can be held responsible for the latent insufficiency of the unloading apparatus which they voluntarily furnished for his use.

Exceptions sustained.

COMMONWEALTH V. REYNOLDS.

(120 Mass. 190.)

Arrest — right of officer to break into dwelling house of third person.

An officer, who has a warrant for the arrest of a person charged with a misdemeanor, and who has reasonable cause to believe that such person is in the dwelling-house of another, after notifying him that he has a warrant against a person in the house, and upon demanding entrance, is refused, has a right to enter the outer door of the house by force, for the purpose of serving the warrant; and he cannot be treated as a tres-

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passer, although he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto, and in fact the person sought for is not there.

INDICTMENT charging the defendant in the first count with an assault with a gun on Henry B. Woodman, with intent to kill; and in the second count, with a simple assault and battery.

At the trial in the Superior Court, before BRIGHAM, C. J., it appeared in evidence on the part of the government, that on the morning of April 21, 1875, Woodman, who was then a constable of the town of Medway, made a complaint before one Deans, a trial justice, against one McKenna for drunkenness, and that Woodman went directly from the office of the magistrate to the house of the defendant, stopping on the way to take one Drake with him, not visiting the residence of McKenna, or looking elsewhere than at the defendant's house for him. Woodman at the trial testified that, on the morning of said April 21, the wife of McKenna requested him, Woodman, to make a complaint on the charge of drunkenness against McKenna, and informed him that McKenna was then at the house of Reynolds, the defendant. This was the only evidence upon which Woodman appears to have acted in going to the defendant's to arrest McKenna; and the government put in evidence tending to prove that, before breaking open the door of the defendant's house, Woodman first rapped on the front door of the defendant's house, but received no response; that he then went around to the back door of the house and also rapped there, whereupon the defendant appeared at the window; that Woodman informed the defendant that he held a warrant to arrest a man in his house, but that he did not want him, the defendant, and he did not state to the defendant, nor did the defendant inquire of him, who that person was against whom he held the warrant; neither did he name the party he wanted to arrest. The government also introduced evidence to the effect that the defendant stated three times to Woodman that he should leave the premises or he, the defendant, would kill said Woodman; that thereupon Woodman proceeded forcibly to enter the back door of the defendant's house, when the defendant shot at and hit Woodman.

There was no evidence introduced by the government tending to show that McKenna was in the house at this time, and the only evidence on this point came from the defendant and his witnesses, and was to the effect that McKenna was not in there at the time and had not been there on that day. And from all the evidence it appeared that he was not arrested there but was arrested elsewhere on that day.

The defendant denied that Woodman gave him any information as to

his business there, and he and his witnesses testified that they did not hear Woodman inform the defendant that he held a warrant, or that he wanted to arrest any person, but they all testified that Reynolds ordered Woodman to leave his premises, and did not fire until after so ordering Woodman, and until Woodman had broken open the door and was proceeding forcibly to enter the premises; the defendant also testified that he sighted his gun and aimed at the door and shot thereat, and that he had no intention to shoot or kill the defendant, but his purpose was only to intimidate Woodman; and the evidence introduced by the defendant was also to the effect that he had stated to his brother-in-law, who was in the room with him, that he had no intention of hitting Woodman. He also testified that he was accustomed to the use of the gun, and that the scattering of the shot was attributable to the firing through the window, as it did not usually scatter much at short distances.

The judge instructed the jury as follows :

“ If the officer had a warrant directed to him as a constable of the town of Medway, authorizing and requiring the arrest of McKenna for the offense of drunkenness, and having an honest belief, induced by information which, reasonably considered, justified such belief, that McKenna was in the defendant's house, and for the purpose of arresting McKenna, went to the house of the defendant, notified him that he had a warrant for the arrest of a person in his house, and requested or demanded of the defendant admission to his house for the purpose of serving such warrant, and, upon the defendant's refusal to admit him, proceeded to make a forcible entrance through an outer door of the defendant's house, he was not a trespasser upon the defendant's dwelling-house, whom the defendant might lawfully repel by force from his dwelling; and if under such circumstances the defendant committed an assault upon said Woodman, it was an unlawful and criminal assault and battery; and, if committed with an intent to kill said Woodman, or by wanton or reckless acts, the ordinary and natural consequence of which would be the killing of said Woodman, the jury would be justified in finding the defendant guilty of an assault with intent to kill, as alleged in the first count of the indictment; but if the jury should have reasonable doubt of such intent to kill, or of the wanton and reckless character or tendency to kill, of such acts, and at the same time should be satisfied beyond a reasonable doubt that the defendant's assault was unlawful and criminal, he might be found guilty of an assault and battery as alleged in the second count of the indictment, committed without intent to kill, and either of these findings, according to the evidence applying to each, would be justified, notwithstanding said McKenna was not in fact then

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in the house of the defendant, and said Woodman did not notify the defendant that he had a warrant for the arrest of McKenna, the defendant not having inquired or sought to know whom the person was whom said Woodman was attempting to discover and arrest."

The jury returned a verdict of guilty on the first count; and the defendant alleged exceptions.

M. Fischacher, for defendant.

W. C. Loring (*O. R. Train*, Attorney-General with him), for the Commonwealth.

DEVANS, J. The instructions of the presiding judge state substantially the propositions that an officer, who is provided with a warrant to arrest one charged with a misdemeanor, and who has information which leads him reasonably to believe that the person sought is within the dwelling-house of a third person, upon notice to such third person that he has a warrant against one who is in the house, and, upon demanding admission, such admission being refused, is entitled, for the purpose of serving his warrant, to make forcible entrance through the outer door of the house; and further, that the officer cannot be treated, when he has thus entered, by the owner of the house, as a trespasser therein, even if he has failed to notify the owner who the person sought to be arrested is (no inquiry having been made in relation thereto), and even if such person is not actually within the house.

The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king. It had no application, therefore, to the criminal process. Even in case of a misdemeanor, while it has been held in some cases that, before breaking open the outer door, the officer should demand admission, it is fully recognized in all the cases, that, after such demand and its refusal, the officer may lawfully enter by force and serve his process, even if it be against the occupant of the house. *Launock v. Brown*, 2 B. & Ald. 592; *Burdett v. Abbott*, 14 East, 1, 163; *Curtis' case*, Fost. 135; *Semayne's case*, 5 Rep. 91; *Kneas v. Fittler*, 2 S. & R. 263. As this privilege of the house is intended for the benefit of the occupant thereof and his family, it would necessarily follow that when he could not be protected by it, no third person could. *Semayne's case*, *ubi supra*.

The rule cited by the defendant's counsel from 2 Hale's P. C. 103, 117, that an officer who breaks into another's house to arrest a felon is justified if he is found therein, but otherwise not, does not apply to the case

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of an officer who, holding a warrant against an alleged offender, has reasonable cause to believe that he is within such house, and who, after demanding admittance and being refused, then forcibly enters. *Commonwealth v. Erwin*, 1 Allen, 587.

Nor would the occupant of the house have any ground of complaint, even if he were not informed who the person thus sought actually was, when he made no inquiry in reference to it. Unless he endeavored to be further informed, it was sufficient for him to know that an officer, provided with a warrant against an alleged offender, who believed that he was within his house, was seeking to arrest him there.

The instructions given upon the hypothesis that the defendant did not hear or understand that the officer had a warrant, but acted upon the honest belief that he was attempting an unjustifiable invasion of his premises, were all that the defendant could justly claim. If the sixth instruction requested, which was that "if the officer was first seen by the defendant while in the act of breaking open the defendant's outer door, the defendant was not required to inquire his business, if he notified him to leave, before he could repel the invasion of the officer," meant only that if what the defendant thus saw was all that was then known to him, he was justified in repelling the invasion by force, it was fully covered by the instructions actually given upon this subject. If, however, it was intended to ask a ruling that while the object of the officer, and the purpose for which he was seeking an entrance, were known to the defendant, yet, if the first that was actually seen by the defendant was the attempt to break open the outer door, he could thus repel the invasion, such ruling should not have been given.

[The remainder of the opinion is devoted to the consideration of unimportant questions.]

Exceptions overruled.

SEVERY V. NICKERSON.

(120 Mass. 806.)

Negligence — injury to trespasser — dangerous premises.

A laborer, employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. *Held*, that he was a mere intruder, and that the owners of the vessel were not liable for the injury.*

* See *Pierce v. Whitcomb*, ante, p. 120.

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TORT for an injury sustained by the plaintiff on board the defendant's vessel, by a fall through a hatchway left open and without proper guards or barriers. The material facts, as they appeared at the trial in this court, before AMES, J., were as follows :

The plaintiff was employed by his son, at the time in the employ of the Boston Ice Company, by whom the vessel was loaded, to assist in loading a quantity of ice on board the vessel. At an early hour of the day, before sunrise, and while it was quite dark, the plaintiff and his son went with a wagon-load of ice to the wharf where the vessel lay, and slid the ice on board, upon the middle deck, down some planks from the wharf, through a port-hole in the vessel's side, which they opened, the plaintiff hauling the ice upon the slide and his son receiving it on board. The son, after the ice was all on board, went forward to the ice-chest; and the plaintiff, after remaining a short time on the wharf, also went on board, entering the vessel upon the middle deck by the port-hole through which the ice was put on board. It was quite dark there, and the upper hatch was closed. After standing a short time, he concluded to go and see where the ice-chest was, and for that purpose walked forward, supposing it to be perfectly safe and seeing no danger, when he fell through the hatchways on the middle deck and the deck beneath, into the hold, breaking his leg and sustaining other injuries. The plaintiff had never been on board the vessel before, and was not directed or called by his son to go on board or to go forward to the ice-chest. The only caution that his son gave him was to be careful as he came down the slide. When the plaintiff and his son arrived at the vessel, the hatches of the upper deck were on, and the heavy doors of the port-holes were closed.

Upon this evidence the judge ruled as matter of law that the action could not be maintained, directed a verdict for the defendants, and reported the case for the consideration of the full court. If the ruling was incorrect, the verdict was to be set aside and the case stand for trial otherwise, judgment on the verdict.

G. A. Somerby & F. F. Heard, for plaintiff.

C. T. Russell, Jr. (C. T. Russell with him), for defendants.

DEVENS, J. The distinction which exists between the obligation which is due by the owner of premises to a mere licensee, who enters thereon, without any enticement or inducement, and to one who enters upon lawful business by the invitation, either express or implied, of the proprietor, is well settled. The former enters at his own risk; the

latter has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him in order that no injury may occur. There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated. *Sweeny v. Old Colony Railroad*, 10 Allen, 868; *Indermaur v. Dames*, L. R., 1 C. P. 274; and L. R., 2 C. P. 811.

There was no evidence that the defendants, by any servant or agent, directed the ice to be put on board at the time it was done, or contemplated that any such thing was to be done, and it was shown that the hatches of the upper deck were on, and the heavy doors of the port-holes were closed, by either of which access could alone be obtained to the middle deck, when the plaintiff and his son arrived at the vessel. Assuming, however, that the plaintiff's son, in whose employ he went there, had a right to break open the port-holes, and proceed to stow the ice on board, and that the son, as well as any workman who might accompany him to aid in stowing the ice, had a right to expect that all proper precautions would be taken to protect them while doing this service, and that as to them it was negligent to leave the hatchways open, the plaintiff still fails to show any negligence of which he has a right to complain. He had finished all the work, which his son had desired him to do, in sliding down the ice from the wharf upon the middle deck. After remaining a short time upon the wharf, he went on board the vessel, and, "after standing a short time, he concluded to go and see where the ice-chest was," and, in walking forward for that purpose, the injury occurred. He did not go on board, and afterward forward, in response to any request or call from his son (who simply told him to be careful as he came down the slide), nor for any purpose of aiding in the stowing of the ice. Under these circumstances he was not on the steamer even permissively, or as a licensee. He was an intruder, who was moving about the middle deck solely for the purpose of gratifying his curiosity, and no liability was incurred by the owners of the vessel for an injury sustained by him while thus acting, they not having been guilty of any active misconduct toward him.

It is unnecessary, in this view of the case, to consider whether the plaintiff, in moving about in the dark upon the middle deck of a vessel with which he was unacquainted, was himself in the exercise of due care.

Judgment on the verdict.

Cook v. Baldwin.

COOK v. BALDWIN.

(120 Mass. 317.)

Bill of exchange — acceptance — part payment.

The words "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawee, do not of themselves necessarily import an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible.

A part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder.

CONTRACT on five drafts, payable to the plaintiffs, drawn on the defendant and alleged to have been accepted by him. Trial in the Superior Court, before PITMAN, J., without a jury, who allowed a bill of exceptions in substance as follows :

The plaintiffs introduced evidence tending to show that the defendant wrote the following words on four of the drafts : "I take notice of the above, Henry Baldwin ;" and, on one of these drafts, for \$600, subsequently made a partial payment of \$400 ; that these orders were drawn on the defendant by certain debtors of the plaintiffs in their favor, to pay them for building materials by them furnished to said debtors, with which to build four brick dwelling-houses, one on each of four lots of land in Linwood street, in Boston ; that before any of the orders were drawn, one of the debtors made four several mortgages, one on each of said lots of land, and each to secure said debtors' note to the defendant for the sum of \$6,000, for the purpose of raising money to pay for said land and building said dwelling-houses, which the defendant contested ; that the defendant retained the entire consideration for the mortgage notes in his own control, and afterward made payments for the land, and for labor and materials for erecting the dwelling-houses thereon ; and that, at the time the orders were respectively drawn and presented to him, he had a sufficient sum remaining in his control from the consideration of said mortgages to pay the orders in full, according to their terms ; and that the work on said houses was carried forward, so that all of said orders would average due on or about September 15, 1872, if the defendant was liable thereon.

The plaintiffs put in other parol evidence ; and that the defendant put in parol evidence tending to show that he declined to accept or to become bound to pay the plaintiffs.

The plaintiffs asked the judge to rule that the writing of the words on

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these orders by the defendant was a valid and legal acceptance of the same by him, and rendered him liable to pay the same; and also that writing the words on the order for \$600, and subsequently paying a portion of the same, constituted a valid and legal acceptance of that order, and rendered the defendant liable to pay the remainder of the same.

The judge refused so to rule, but held that these words, written on the orders, and the acts of the defendant, did not, in law, amount to an acceptance of either of the orders, or render the defendant liable to pay the same or any part thereof, but that these acts were only pieces of evidence; and, upon the whole evidence, found no acceptance proved, and found for the defendant. The plaintiffs alleged exceptions.

L. Mason, for plaintiffs.

H. D. Hazelton, for defendant.

DEVENS, J. The whole of the facts, upon which the Superior Court has found that there was no acceptance of the orders, upon which this suit is brought, are not before us, so that even if, when all the facts are found, it is a question of law for the court whether they prove an acceptance, the question is here only whether the writing of the words "I take notice of the above" constitutes in itself such complete proof of acceptance that it was not competent for the Superior Court to find otherwise.

These orders may legally be defined as inland bills of exchange, for, although not negotiable, they have all the necessary parties to such instruments: a drawer, drawee and payee. *Wells v. Brigham*, 6 Cush. 6. An acceptance of a bill of exchange may be by an oral promise to pay it as well as a written one, or by such language and conduct on the part of the drawee, when it is presented to him, as justifies the payee in believing that he consents to pay it. *Grant v. Shaw*, 16 Mass. 341; *Ward v. Allen*, 2 Metc. 53; *Wells v. Brigham*, *ubi supra*; *Dunavan v. Flynn*, 118 Mass. 537. The Stat. of 1 & 2 Geo. IV, ch. 78, which provides that no acceptance of inland bills of exchange shall be sufficient to charge any person unless the same is in writing, has been followed by similar legislation in some of the States of the Union. *Spear v. Pratt*, 2 Hill, 582. No such provisions have, however, been incorporated into the laws of this Commonwealth.

As an oral acceptance may be shown, it follows that an oral refusal may also be shown, when all that has taken place between the parties is

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oral. And when that which is written upon the bill does not by its terms necessarily import an acceptance, the party sought to be charged should be permitted to show all that was then said and done, in order that it may be determined, from the whole evidence, whether he assented to the request of the bill. The words written upon the bill are a recognition only that the bill has been presented for acceptance; they are not inconsistent with a positive refusal to accept or to become bound to pay the plaintiffs, of which refusal, according to the facts reported, there was evidence.

In regard to the acceptance of bills of exchange, it has sometimes been said that any words written thereon not putting a direct negative upon the request therein contained, such as "presented," or "seen," or the writing of the drawee's name, constitute *prima facie* a complete acceptance by the law merchant. Bayley on Bills (2d Am. ed.), 168. In some cases, it has been left to the jury to determine as a fact whether the words indorsed, according to the custom of merchants, import an acceptance. *Anon.*, Comb. 401; *Dufaur v. Oxenden*, 1 Mood. & Rob. 90. But even if it be held that the words here written would, if unexplained, be a sufficient acceptance, they may be explained as between the payee and drawee, by showing the circumstances under which they were written and accompanying declarations, not inconsistent with an acknowledgment that the bills had been brought to the drawee's notice. Story on Bills, § 248.

The fact that a payment was made upon one of the bills does not in law bind the party thus paying to pay the remainder. It may have been accompanied by a positive refusal to pay more. No indorsement of the payment was made by the drawee, and the fact that the drawee made this payment, was simply to be taken in connection with other evidence in determining whether he recognized the bill as one accepted by him and which he was bound to pay.

Exceptions overruled.

PARKS V. BISHOP.

(120 Mass. 340.)

Right of way — adverse user.

When a right of way to certain land exists by adverse use and enjoyment only, proof that it was used for a variety of purposes, covering every purpose required by the

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dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition.

BILL in equity alleging that the plaintiff was the owner of the fee in the soil and of a right of way in a passage-way leading from Purchase street by land of the plaintiff and to a shop of the defendant, which adjoined the rear of a store of the defendant on Atlantic avenue; and praying that the defendant might be restrained from using the way as appurtenant to the land on which that store was built, or for the purpose of passing, or of carrying merchandise or other things, between that store and Purchase street. The answer alleged that the defendant had acquired a right to such use by adverse possession.

Hearing before WELLS, J., who ordered an injunction to issue, and reserved the case for the consideration of the full court, upon a report, the material part of which is stated in the opinion.

W. G. Russell & G. Putman, Jr., for plaintiff.

S. J. Thomas, for defendant.

GRAY, C. J. The report of the judge before whom this case was heard in the first instance, states the facts proved at the hearing, and his decision that the use of the way in question by the defendant, in the manner and for the purpose complained of, was not justified by any right acquired by Lakin (under whom the defendant claims) through the use of the way by him as stated in the report, and that an injunction should issue, subject to the revision and determination of the full court upon the question, among others, "whether Lakin, upon the facts stated, had acquired such a right of way as to constitute a good defense." The report, being on the equity side of the court, submits to our revision all inferences of fact, as well as conclusions of law. *Wright v. Wright*, 18 Allen, 207, 209; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 47.

When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. *Ballard v. Dyson*, 1 Taunt. 279; *Dowling v. Higginson*, 4 Mees. & W.

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245; *Dare v. Heathcote*, 25 L. J. (N. S.) Exch. 245; *Williams v. James*, L. R., 2 C. P. 577; *Sloan v. Holliday*, 30 L. T. (N. S.) 757. But if the condition and character of the dominant estate are substantially altered—as in the case of a way to carry off wood from wild land, which is afterward cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterward turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. *Atwater v. Bodfish*, 11 Gray, 150; WILES, J., in L. R., 2 C. P. 582; *Wimbledon Commons v. Dixon*, 1 Ch. D. 362.

In the present case, the report states that for more than twenty years Lakin had, in the shop abutting upon the passage-way in question, a steam engine, which was driven by boilers in the larger building on the lot behind, and was used for operating the machinery in that building, the three stories of which were respectively occupied for a blacksmith's shop, a carriage shop, and a paint shop; that there was a door in the wall between the two buildings, which was constantly used for the purpose of passing between them through the engine room and over the passage-way; that the space in the passage-way was occasionally used for the purpose of setting tires upon wheels, in connection with the work in the shop; that all the coal for use under the boilers was brought in through the passage-way, and deposited in the basement or cellar under the engine room, until used in the regular course of business; and that the way was used generally as a back entrance or thoroughfare, as convenience required, in connection with the shops occupied by Lakin, without question or objection, for more than twenty years.

These facts appear to the court to justify and require the conclusion that Lakin had acquired by prescription a right of way for all purposes reasonably necessary for a manufactory upon the two lots, and which, upon the buildings being destroyed by fire and rebuilt for a manufactory and store-house, he was entitled to use for the purpose of bringing goods into the smaller building abutting upon the passage-way, to be thence hoisted up into the larger building, for storage and use therein; that there has been no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement, and that for this reason the defendant has not exceeded his rights in the use of the passage-way.

Bill dismissed.

HILBOURNE v. COUNTY OF SUFFOLK.

(120 Mass. 393.)

Streets — damages for lands taken for.

Upon a trial to assess damages for land taken to widen a street, it is erroneous to instruct the jury that no benefit, which was shared in common with other estates on the highway, from which no land had been taken, can be deducted from the damages of any abutter.

PETITION to the county commissioners for a jury to assess damages for the taking of land for the widening of Washington avenue in Chelsea.

At the trial before a sheriff's jury, it appeared that, for a part of the distance between the two terminal points of widening, the widening was wholly on one side of the avenue, and for the residue of the distance was on both sides of the avenue, so that from some estates, between the two terminal points of widening, land was taken for the widening; but from other estates, between these terminal points, no land was taken.

The presiding officer instructed the jury, that "if there was a general benefit or advantage to the petitioner's remaining real estate received from the widening, but that the same general benefit or advantage was also received from the widening by real estate of other persons on Washington avenue, no part of whose estate was taken for the widening, such general benefit or advantage to the petitioner's remaining real estate cannot be deducted from the petitioner's damages."

The jury returned a verdict for the petitioner. In the Superior Court, the verdict was accepted; and the respondent appealed to this court.

J. L. Stackpole, for respondent.

J. D. Ball, for petitioner.

ENDICOTT, J. Where land is taken for a highway by public authority, the owner is entitled to a just and fair compensation for that of which he has been deprived. In determining the amount of his compensation, the direct and peculiar benefit which results to his remaining and adjoining land is to be considered. In an early case, it was said that the rule of damages was "the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining, from which is to be

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deducted the benefit of the road, if any, to the owner of the land. *Commonwealth v. Norfolk*, 5 Mass. 485, 487. See, also, *Commonwealth v. Coombs*, 2 id. 489, 492. This rule as to the deduction of benefits was afterward embodied in the statutes. Stat. 1824, ch. 153; Rev. Stats., ch. 24, § 31; Gen. Stats., ch. 48, § 16. In *Meacham v. Fitchburg Railroad*, 4 Cush. 291, it was held that there must be some limitation of the general proposition, as stated in the statute; and the rule was laid down that any direct and peculiar benefit or increase of value, accruing to land of the same owner, adjoining or connected with the land taken, and forming part of the same parcel, is to be allowed by way of set-off, but not the general benefit or increase of value received by such land in common with other lands in the neighborhood. This distinction has been observed in all the cases which have been since decided. *Upton v. South Reading Branch Railroad*, 8 Cush. 600; *Farwell v. Cambridge*, 11 Gray, 413; *Dickenson v. Fitchburg*, 13 id. 546; *Whitman v. Boston & Maine Railroad*, 8 Allen, 133; *Allen v. Charlestown*, 109 Mass. 243; *Upham v. Worcester*, 113 id. 97. From these cases it appears that there are two kinds of benefit received by an estate bounding upon a way laid out, altered or widened; first, the special and direct benefit arising from its own position upon the way itself; and, second, the general benefit not arising from its location on the way, but from the facilities and advantages caused by the way, which affects all estates in the neighborhood equally, and which are shared in common with such estates. The direct and peculiar benefit may be set off; the general benefit cannot.

The highway in question, called Washington avenue, in Chelsea, was widened through its entire length. A portion of it was widened by taking land on one side only, so that, upon that portion, there were other estates from which no land was taken.

The ruling of the presiding officer upon the question, what benefits should be set off under the statute, was in substance that no benefit could be set off which was shared in common with other estates on the highway, from which no land had been taken.

This ruling was clearly erroneous. Under it, the peculiar and direct benefit, accruing to the estate from its position on the highway itself, could not be allowed, if similar direct benefits accrued to other estates on the same highway from which no land had been taken. These other estates may have received peculiar benefits by the widening, and they may also have received general benefit common to all the estates in the neighborhood. The advantages that an abutter may receive from his location on a highway laid out, altered or widened, are none the less peculiar and special to him because other estates on the street receive special and

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peculiar benefits of a similar kind. *Allen v. Charlestown*, 109 Mass. 243. The ruling in that case, held to be bad, was that if all the estates abutting on the street are benefited in a similar manner, the amount of his benefits cannot be deducted from the damages of any abutter. Here the ruling limits the comparison to the estates abutting on the street from which no land had been taken. But an estate abutting on the street may receive a peculiar and direct benefit, although no land has been taken from it. A new highway may be laid out, or an old way may be widened, so as to cause the estate to abut upon it without taking any of its land. The amount of peculiar benefit thus accruing to it may never be the subject of judicial inquiry, because, no land being taken, no proceedings for damages can be instituted. But the benefit it receives is none the less direct on that account.

We are of opinion that this case falls within the decision in *Allen v. Charlestown*, *ubi supra*.

Verdict set aside.

PARTRIDGE v. HOOD.

(120 Mass. 403.)

Contract for compounding misdemeanor.

An action will not lie on an agreement entered into for the purpose of compounding any misdemeanor, unless it appears that satisfaction has been acknowledged in and approved by the court in which the prosecution was pending, according to the Gen. Stats., ch. 170, § 33, and ch. 171, § 28.

CONTRACT upon the following agreement, signed by the defendant and dated October 5, 1874:

“In consideration of one dollar and other good and valid consideration to me paid, I hereby agree, upon the delivery to me and in my name, within three days from the date hereof, of a quitclaim deed, conveying the land described in a mortgage deed to Winfield S. Partridge given by Edward K. Hood, said quitclaim deed to be given by said Partridge and said land to be free of all incumbrances except a mortgage now held by the South Scituate Savings Bank for \$1,200 covering on a portion of said land, to give said Partridge a first mortgage deed for \$1,250, payable in two years at eight per centum per annum, interest payable semi-annu-

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ally, on my homestead estate situated on Essex street, Lynn, Mass. And also a power of sale first mortgage upon a portion of said land to be conveyed to me by said Partridge for \$1,000, payable in two years with interest thereon payable semi-annually at the rate of eight per centum per annum; said land being the westerly half of said land described in said mortgage from Edward K. Hood to W. S. Partridge."

The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son.

At the trial in the Superior Court, before BACON, J., without a jury, the following facts appeared: In August, 1874, a complaint was entered in the Police Court of Lynn, against Edward K. Hood, for having mortgaged to the plaintiff in this action certain real estate in Lynn, without informing him of an existing incumbrance upon it. On this complaint, Hood was bound over to answer at the next term of the Superior Court for the county of Essex. The land mentioned was the same as that referred to in the agreement declared upon. Upon the day before the grand jury met, one Silsbee, the plaintiff's agent, went to the house of the defendant, and, according to his own testimony, told her that if she would purchase the land of the plaintiff at what it cost him, he having sold under his mortgage and bought it in, "the matter," meaning the prosecution, "could undoubtedly be arranged." Under this inducement the defendant signed the contract. The defendant testified that she signed the contract to save her son from jail, and that Silsbee told her "the prosecution could be stayed." It further appeared that at the time of the trial the complaint was still pending in the Superior Court, never having been heard by the grand jury, and that no acknowledgment of satisfaction had been made by the plaintiff in court or elsewhere of the complaint; that the amount agreed to be paid by the defendant for the land was the precise amount due by her son to the plaintiff at the date of the contract, and that the plaintiff thereby gave up to the defendant all the security he had for the amount.

The plaintiff contended that the arrangement testified to might be made under the Gen. Stats., ch. 171, § 28, as preliminary to an acknowledgment of satisfaction, and that, at common law, such a misdemeanor might be compounded by the party injured if he received no more than his damages by the injury.

The judge found as a fact that the written agreement declared on was entered into by the defendant for the purpose of compounding said complaint, ruled that it was illegal and void, and ordered judgment for the defendant. The plaintiff alleged exceptions.

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R. E. Harmon, for plaintiff.

D. O. Allen, for defendant.

GRAY, C. J. The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted or applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise and Arbitrament, § 33; *Horton v Benson*, 1 Freem. 204; Bac. Abr., Arbitrament and Award, A.; *Johnson v. Ogilby*, 3 P. Wms. 277, and especially the register's book cited by Mr. Cox in a note to page 279; *Collins v. Blantern*, 2 Wils. 341; 4 Bl. Com. 863, 864. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the crown, and subjected the appellee to damages only, like an action of trespass. *Blake's case*, 6 Rep. 43 b, 44 c; 2 Hawk., ch. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord KENYON; Kyd on Awards (Am. ed.), 64, 68; *Drage v. Ibberson*, 2 Esp. 643; *Fallowes v. Taylor*, Peake's Ad. Cas. 155; S. C., 7 T. R. 475; and by Mr. Justice LE BLANC's suggestion of a distinction between a prosecution for a public misdemeanor and one for a private injury to the prosecutor. *Edgcombe v. Rodd*, 5 East, 294, 303; S. C., 1 Smith, 515, 520. This confusion was not wholly removed by the opinions of Lord ELLENBOROUGH in *Edgcombe v. Rodd*, 5 East, 294, 302; in *Wallace v. Hardacre*, 1 Camp. 45, 46; in *Pool v. Bousfield*, id. 55, and in *Beeley v. Wingfield*, 11 East, 46, 48; of Chief Justice GIBBS in *Baker v. Townshend*, 1 Moore, 120, 124; S. C., 7 Taunt. 422, 426; or of Lord DENMAN in *Keir v. Leeman*, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in *Keir v. Leeman*, 9 Q. B. 371, 395, Chief Justice TINDAL, after reviewing the previous cases, summed up the matter thus: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offense, can be otherwise than illegal, and any promise, founded on such a consideration, otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle

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his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further."

In *Fisher Apollinaris Co.*, L. R., 10 Ch. 297, the plaintiff, pursuant to an agreement of the defendants to abandon a prosecution against him under Stat. 25 and 26 Vict., ch. 88, for a violation of their trade-mark, gave them a letter of apology, with authority to make such use of it as they might think necessary, and, after they had published it by advertisement for two months, filed a bill in equity to restrain them from continuing the publication, which was dismissed by the Lords Justices. The principal grounds of the decision appear to have been that the defendants had done nothing that the plaintiff had not authorized them to do; and that, even if the publication affected the plaintiff's reputation, a court of chancery had no jurisdiction to restrain it. See *Prudential Assurance Co. v. Knott*, L. R., 10 Ch. 142; *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69. It was indeed observed that "it was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway." L. R., 10 Ch. 302. But this observation was not necessary to the decision; and in *The Queen v. Blakemore*, 14 Q. B. 544, an agreement for the compromise of an indictment for not repairing a highway was held illegal and void. All the other recent English authorities support the judgment of Chief Justice TINDAL, above quoted. *The Queen v. Hardey*, 14 Q. B. 529, 541; *Clubb v. Hutson*, 18 C. B. (N. S.) 414; *Williams v. Bayley*, L. R., 1 H. L. 200, 213, 220.

In *Jones v. Rice*, 18 Pick. 440, 442, Mr. Justice PUTNAM, delivering the opinion of this court, after alluding to the English cases in the time of Lord KENYON, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said: "We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offense, he might extort, for his own use, money which properly should

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be levied as a fine upon the criminal party for the use of the Commonwealth."

It is true that the prosecution in *Jones v. Rice* was for a riot as well as for an assault. But the language and the reasoning of the opinion extends to the compounding of any offense whatever. Any act which is made punishable by law as a crime is an offense against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. *Hinds v. Chamberlin*, 6 N. H. 225; *Shaw v. Spooner*, 9 id. 197; *Shaw v. Reed*, 30 Me. 105; *Bowen v. Buck*, 28 Vt. 308; *People v. Bishop*, 5 Wend. 111; *Noble v. Peebles*, 13 S. & R. 819, 822; *Maurer v. Mitchell*, 9 W. & S. 69, 71; *Cameron v. M'Farland*, 2 Car. Law Rep. 415; *Corley v. Williams*, 1 Bailey, 588; *Vincent v. Groom*, 1 Yerg. 480; Metc. Con. 226, 227; 1 Story's Eq. Jur., § 294.

The legislature of the Commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony), if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings may be ordered. Rev. Stats., ch. 135, § 25; ch. 136, § 27; Gen. Stats., ch. 170, § 33; ch. 171, § 28. Such an acknowledgment of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice. *Commonwealth v. Dowdican's Bail*, 115 Mass. 133. See, also, *State v. Hunter*, 14 La. Ann. 71.

In the case at bar, it being found as a fact that the agreement sued on was entered into by the defendant for the purpose of compounding a complaint against her son for a misdemeanor, and it not appearing that satisfaction has ever been acknowledged in or approved by the court in which the prosecution was pending, judgment was rightly ordered for the defendant.

Exceptions overruled.

McDonald v. Massachusetts General Hospital.

McDONALD v. MASSACHUSETTS GENERAL HOSPITAL.

(120 Mass. 432.)

Public charitable institution — what is — when not liable for acts of servant.

A corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution.

The facts that a corporation, established for the maintenance of a public hospital, by its rules requires of its patients payment for their board, according to their circumstances and the accommodation they receive ; that no person has individually a right to demand admission ; and that the trustees of the hospital determine who are to be received ; do not render it the less a public charity.

A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon.

TORT for injuries sustained by reason of negligent and unskillful surgical treatment of the plaintiff by the defendant's servants. At the trial in the Superior Court, before ALLEN, J., the plaintiff put in evidence tending to show the followings facts :

The defendant was incorporated by the Stat. of 1810, ch. 94. The funds of the corporation have been derived from grants, devises, donations, bequests and subscriptions of money and other property contributed by the Commonwealth and benevolent persons, to be used and improved for the erection, support and maintenance of a general hospital for sick and insane persons, according to the charter and acts in amendment thereof, and from profits of the Massachusetts Hospital Life Insurance Company, paid over to the defendant, and also in part from the board of paying patients.

The plaintiff, on December 9, 1870, fell from a building on which he was at work, and his thigh bone was fractured, and on the same day he was brought to the hospital of the defendant, and there remained in one of the wards until February 4, 1871, when he voluntarily went away. While in the hospital he had gratuitously the surgical and medical care, attendance and nursing which the hospital affords to its patients ; he occupied a free bed, and all the expenses of his medical and surgical treatment and nursing, and of his shelter, warmth, food, washing and bedding, were borne as a charity by the defendant. The house pup'l, ap-

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pointed as provided in the by-laws, and who in the first instance set his fractured thigh bone, and continued, while the plaintiff was at the hospital, to attend to the plaintiff's case, under the direction of the attending surgeon, was a member of the Harvard Medical school, in the last of his three years of professional study, and received his degree of M. D. from Harvard College in the following June, 1871; the attending physicians and surgeons recommended him for his post, and the visiting surgeon, who had direct charge of the treatment of the fractured bone, and under whose direction and supervision the house pupil acted in his treatment of the plaintiff's fracture, was a man of the highest professional reputation and character; the said house pupil and attending surgeon treated the plaintiff's case gratuitously, and according to the regulations of the Massachusetts General Hospital. The treatment of all cases in the hospital is by the visiting physicians and surgeons, and the house pupils acting under their direction, each officer having the exclusive care and control of all patients assigned to them, and such physicians and surgeons act gratuitously, the defendant providing for patients without means, like the plaintiff, the hospital, nurses, bed, food, warmth and other comforts gratuitously; such visiting physicians and surgeons are practitioners in the city of Boston, outside of the hospital, and are selected by the trustees of the hospital to treat gratuitously patients who come to the hospital for gratuitous treatment; and this was the relation of the visiting surgeon to the defendant in this case.

The plaintiff offered evidence to prove that on the day he came to the hospital he objected to the house pupil doing any thing to or with his fractured leg, and that he wanted and asked to be permitted to wait till the return of the resident physician, who was at the time absent. The plaintiff also offered evidence that previously to this time it had frequently happened that when a patient was brought in, having been injured by accident, the house pupils received him, and treated the case, if they so desired, without consulting any resident or visiting physician. The plaintiff offered other evidence which he claimed tended to show that the fractured bone was not properly set, by reason either of the incompetency and negligence of the house pupil, or of the negligence of the attending surgeon.

The judge ruled that, even if the plaintiff should prove that the fractured bone was not properly set in consequence of the incompetency of the house pupil, or the negligence of him or the attending surgeon, the plaintiff was not entitled to recover, and the jury returned a verdict for the defendant. The plaintiff excepted to this ruling, and the judge reported the case for the consideration of this court. Annexed to the

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report was a copy of the by-laws and regulations of the defendant, the material parts of which appear in the opinion.

L. M. Child, for plaintiff.

D. E. Ware, for defendant.

DEVENS, J. The ground upon which the plaintiff seeks to maintain this action is that the defendant undertook, through its agents and servants, to treat his broken leg, and that this was done so negligently and unskillfully that he was permanently injured. It does not become necessary to consider whether the defendant, as it contends, consented only to provide for the plaintiff a hospital bed, food and other comforts, while the attendance of the house pupil and surgeon was of such a character that they had the direct and exclusive professional charge of the patient, and are the only persons who can be made responsible for any neglect or want of professional skill and care. We are satisfied that, for other reasons, the plaintiff is not entitled to recover upon the case made by him.

The defendant was a public charitable institution under the laws of the Commonwealth. The object for which it was incorporated was to provide a general hospital for sick and insane persons. Stat. 1810, ch. 94. Its funds are derived from grants and donations made by the Commonwealth from profits which it is entitled to receive from the Massachusetts Hospital Life Insurance Company and other companies incorporated in the Commonwealth, and from the grants, devises, donations, bequests and subscriptions of benevolent persons, and from the board of paying patients. While the price of board is placed as low as the funds of the hospital will permit, patients who are there received are expected to pay as nearly as possible according to their own circumstances and to the accommodation they receive. In addition to the accommodations provided for such patients, a certain number of free beds are furnished from the general funds of the institution and from donations made especially for this object, the occupants of which are not expected to pay any thing. Regulations of Hospital, ch. 15, §§ 1-4. Of one of these beds the plaintiff was an occupant.

The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public

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and private charity ; its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity. *Jackson v. Phillips*, 14 Allen, 539. The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. *Gooch v. Association for Relief of Aged Females*, 109 Mass. 558.

Nor does the fact that the trustees, through their agents, are themselves to determine who are to be the immediate objects of the charity, and that no person has individually a right to demand admission to its benefits, alter its character. All cannot participate in its benefits : the trustees are those to whom is confided the duty of selecting those who shall enjoy them, and prescribing the terms upon which they shall do so. If this trust is abused, the trustees are under the superintending power of this court of equity, by virtue of its authority to correct all such abuse, and the interest of the public therein, that is to say, of the indefinite objects of the charity, may be represented by the attorney-general. *Sanderson v. White*, 18 Pick. 828 ; *Attorney-General v. Old South Society*, 18 Allen, 474.

It might well be questioned whether any contract could be inferred between the plaintiff and defendant. It has offered to him freely those ministrations which, as the dispenser of a public charity, it has been able to provide for his comfort, and he has accepted them. It has no funds which can be charged with any judgment which he might recover, except those which are held subject to the trust of maintaining the hospital. If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work, by which injury has occurred, it has been held that they were not liable if proper care had been used by them in selecting those who were actually to perform the work. *Holliday v. St. Leonard's*, 11 C. B. (N. S.) 192. The liability of the defendant corporation can extend no further than this ; if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their in

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ferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them. There was no attempt to show that the trustees had in any respect failed in the performance of their duty. If they had made suitable regulations, had selected proper persons to fill the position of surgeons, then, whether those persons neglected to perform their duty, or whether another person, as the house pupil, not selected for the office of surgeon, assumed, without authority, to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation.

Judgment on the verdict.

BLASDEL V. FOWLE.

(120 Mass. 447.)

Bankruptcy — secret agreement with creditor — obligations in fulfillment thereof void

A secret agreement in fraud of creditors, under which a bankrupt is to pay the debt of his assignee in full, if he will assent to his discharge, is illegal at common law, and contrary to the provisions of the United States bankrupt act.

A note and mortgage on her separate property made and signed by the wife of a bankrupt, at his request, in pursuance of an agreement, under which the bankrupt was to pay the debt of his creditor and assignee in full, if he would assent to his discharge in bankruptcy, are without consideration and void; and it is immaterial that the note and mortgage were executed after the discharge, and that the wife did not know of the agreement.

All instruments made for the purpose of giving effect to an illegal agreement are tainted with the illegality, and cannot be enforced in a court of equity.

BILL in equity, by the holder of a mortgage upon a parcel of land, to redeem a prior mortgage thereon. Hearing, on the pleadings and an agreement of facts, before AMES, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

H. L. Hazelton, for plaintiff.

F. A. Brooks & F. Morison, for defendants.

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ENDICOTT, J. The material facts in this case may be briefly stated. The plaintiff derives her title to the mortgage, described in the bill, under the will of her husband, John C. Blasdel. He was assignee in bankruptcy, and one of the largest creditors, of Charles L. Fowle; and his vote in favor of Fowle's discharge was given upon an agreement with Fowle that his debt, less the dividend, should be paid in full by Fowle after his discharge, as if no discharge had been obtained. Fowle obtained his discharge, and Blasdel demanded payment. A note was made for the amount previously agreed upon, and signed by the defendant, Susan C. Fowle, wife of the bankrupt, and secured by the mortgage on her separate property, which is the subject-matter of this suit. She signed the note and mortgage at the request of her husband, with no consideration moving to her benefit or the benefit of her property.

The agreement under which the bankrupt was to pay the debt of his creditor and assignee in full, if he would assent to the discharge, was illegal at common law, and contrary to the provisions of the bankrupt act. It was a secret agreement in fraud of creditors, and cannot be enforced in any form of proceeding. U. S. Rev. Stats., § 5131; *Cockshott v. Bennett*, 2 T. R. 763; *Phelps v. Thomas*, 6 Gray, 327; *Case v. Gerrish*, 15 Pick. 49; *Coates v. Blush*, 1 Cush. 564; *Partridge v. Messer*, 14 Gray, 180; *Dexter v. Snow*, 12 Cush. 594; *Downs v. Lewis*, 11 id. 76; *Ramsdell v. Edgerton*, 8 Metc. 227; *Smith v. Bromley*, 2 Doug. 696, and note.

The fact is not important that the note of the wife and the mortgage securing it were made after the discharge was obtained, as the only consideration of either rested on the illegal and fraudulent agreement between Blasdel and Fowle. Nor is it material whether the wife knew of the fraudulent agreement when she made the note and mortgage; for the agreement being illegal and void, all instruments made for the purpose of giving it effect are tainted with the illegality, and will not be enforced by a court of equity.

The plaintiff in this case cannot stand in a better position than her testator, and the entry must be

Bill dismissed with costs.

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BLANCHARD v. ILSLEY.

(120 Mass. 487.)

Seduction — who may maintain action for.

At the trial of an action for seduction, it appeared that the injured girl, who was the sister of the plaintiff's wife, was, at the time of the seduction, taking care of the plaintiff's household, without paying board, during the sickness of the plaintiff's wife, upon an understanding with the plaintiff, but with no agreement with her father or herself as to the payment of wages or for any definite period of service. *Held*, that this did not establish the relation of master and servant so as to give a right of action to the plaintiff.

A guardian cannot, as such, maintain an action for the seduction of his ward.

TORT for seducing a girl under twenty-one years of age, alleged to be the plaintiff's servant. At the trial in the Superior Court, before ALLEN, J., there was evidence tending to prove the following facts :

The girl was born July 13, 1855. In 1868 she came to live with the plaintiff and his wife, who was the girl's sister, at Jamaica Plain, and thereafter, with the exception of her absence at school or on visits, continued to live in the plaintiff's house as her home. There was no evidence of any intention on her part to return to live with her father, or of any intention on his part to invite her to return or to claim her services.

The father of the girl kept house with his wife and daughters in Waltham in 1862. In May, 1862, he broke up housekeeping and went alone to Newbern, North Carolina, where he was engaged in business till 1872. In the latter year he returned to Boston, and since then has resided there, boarding at different places. He was in the habit frequently of visiting at the plaintiff's house. After the father's removal to North Carolina, his wife and her daughters boarded together till 1863, when the wife died. Thereafter the daughters lived in Roxbury with their aunt and grandmother until 1867. In that year, the girl went to Pembroke and remained a year on a visit. At the expiration of that visit she came to the plaintiff's house at Jamaica Plain, as above stated. The father paid his family expenses until 1867, since which time he has been unable so to do, and has done nothing toward such expenses.

From 1868 to September, 1871, they attended school at Jamaica Plain. During the vacations, and at other times when at home, she assisted her sister in the care of the latter's children and of the house. No money

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was paid to the plaintiff for her board. Her grandmother furnished some money which paid for her clothing and her personal expenses. In 1870 her grandmother was appointed her guardian, and in that capacity held a small amount of property. In March, 1874, her grandmother died, and the plaintiff was appointed guardian, which appointment he still holds. In September, 1871, the girl went to school at Norton, and remained there till June 14, 1873, with the exception of vacations, of which there were three each year, amounting in all to about two months of each year. The expenses of this schooling were paid by the grandmother. The girl spent the vacations at the plaintiff's house, there rendering the same service as before.

In June, 1873, the plaintiff's wife became insane and was removed to a hospital, and the plaintiff, in anticipation of his wife's removal to the hospital in June, sent for the girl to return immediately from school. She at once left school and returned to the plaintiff's house, arriving there June 14, the day subsequent to the wife's removal. The school term ended July 1. On June 15, the plaintiff and the girl had a conversation about the household arrangements, and it was then agreed between the plaintiff and the girl that the latter should assume the care of the house and of the plaintiff's children, and that she should be assisted by a nurse. An additional servant, who had been employed prior to that time, was discharged by the plaintiff a few days afterward. Subsequently to June 15, the girl took care of the house, doing the necessary work, except the sweeping in the parlors and chambers, assisted the nurse a little in the cooking, and took the entire charge of the oldest child, a boy about five years old. After the plaintiff's wife's return in January, 1874, the girl continued to render the same services, but an additional servant was then obtained to help her.

The father visited at the plaintiff's house before and after June 15, 1873, knew of the service which the girl was rendering, and acquiesced, without saying any thing on the subject by way of assent or dissent.

In August, 1873, the girl made a visit of about three weeks, taking with her the plaintiff's oldest child, of whom she had the sole care during her visit. She went on this visit because, as she testified, she was run down by reason of her impaired condition of health. For the same reason, she afterward made visits in 1874.

There was evidence tending to prove that about June 1, 1873, while attending school at Norton, and subsequently while at the plaintiff's home, during the sickness of his wife, the girl was seduced by the defendant; that prior to 1873, she was strong and well, and of gay, cheerful spirits; and that subsequently to June, 1873, her physical health

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became impaired, she became very nervous and irritable, lost interest in her ordinary occupations, and was unable to work as before.

Upon this evidence the presiding judge ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

R. M. Morse, Jr., for plaintiff.

W. O. Loring (*O. R. Train* with him), for defendant.

COLT, J. Actual loss of service by the wrongful act of the defendant is the technical foundation of the plaintiff's action. Such loss of service will be presumed in favor of the father who has not parted with his right, where the daughter is under age and resides with him; *Hewitt v. Prime*, 21 Wend, 79; and, according to the more recent American cases, where he retains the legal right to claim her service, although she resides and is temporarily employed elsewhere. It results from the legal obligation imposed upon him to provide for her support and education, which gives him the right to the profits of her labor. *Kennedy v. Shea*, 110 Mass. 147, and cases cited; *Furman v. Van Sise*, 56 N. Y. 435, 444; *Emery v. Gowen*, 4 Greenl. 33; *Olinton v. York*, 26 Me. 167; *Griffiths v. Teetgen*, 15 C. B. 844. See, also, note to *Martin v. Payne*, in Bigelow's Lead. Cas. Torts, 286. The father's inability or failure to support his children does not alone deprive him of this right. *Benson v. Remington*, 2 Mass. 118.

In the case at bar, the evidence fails to justify a finding by the jury that the father had permanently or temporarily parted with his right to his daughter's services, or that he had waived his right for any definite or indefinite period, by contract with the plaintiff, permission granted to the child, or otherwise. It fails to show a case of concurrent service, which, if it ever can exist, can exist only when it is the result of contract, without which an infant daughter cannot be the servant of two at the same time. *Hedges v. Tagg*, L. R., 7 Ex. 283, 285. There was nothing to show emancipation or intentional abandonment. The fact that he knew where she was living and the assistance she was rendering, "and acquiesced, without saying any thing by way of assent or dissent," is not enough. The most that the evidence can be said to prove is that, upon an understanding between the plaintiff and the injured girl, who was a sister of his wife, the latter, with no agreement with her or with the father for the payment of wages, or for any definite period of service, assumed the care of the plaintiff's household while the wife was disabled

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by sickness, and sustained that relation, without paying board, at the time of the alleged seduction. This does not establish the relation of master and servant, so as to give a right of action to the plaintiff, to the exclusion of, or concurrently with the father.

The fact that the plaintiff was also the legally appointed guardian carries with it no right to the service of the ward, and no obligation to support her, except to the extent of the property belonging to her which came to his hands. Gen. Stats., ch. 109, § 19.

Exceptions overruled.

SMITH V. BOSTON AND MAINE RAILROAD.

(120 Mass. 490.)

Sunday — personal injury to one traveling unlawfully upon.

One who travels on the Lord's day to ascertain whether a house, which he has hired, and into which he intends to move the next day, has been cleaned, is not traveling from necessity or charity, and cannot maintain an action for injuries sustained at a railroad crossing, through the negligence of the servants of the railroad corporation. (See note, p. 540.)

TORT for personal injuries sustained by the plaintiff through the negligence of defendant's servants.

At the trial in the Superior Court, before PUTNAM, J., the plaintiff testified that he was a machinist in the employ of the defendant corporation during week days, his business being the repair of their locomotives; that he had been at work all the week previous to the accident, and on Sunday, August 23, 1873, in the afternoon, having attended church in the morning, he walked from his residence in Leverett street, Boston, to Charlestown, to see if a person of whom he had hired a house during the previous week, and to which he was to move on the following Monday, had got the house cleaned; that he saw the person, and on his return, while passing along Austin street, over which the railroad ran, and while standing on the Charlestown side of the gate, he was hit by one of the gates, which was struck and broken by a locomotive engine passing at the time, as the gate was being swung across the street by one of the servants of the corporation, and sustained the injury complained of.

The wife of the plaintiff testified that her husband and herself were

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boarding at that time with her mother in Boston; that her mother had told her during the previous week that she wanted their room for another person, and she had told her mother that they would leave their room on Monday; that her mother had let it to her son, who was to take it the following Tuesday; that they had engaged the room in Charlestown for Monday, and had their goods all packed up on Saturday; that her husband, the plaintiff, walked over to Charlestown on Sunday, as stated by him, and was assisted home by two men, severely injured; and that on the following Monday they moved to Charlestown, as they had proposed to do.

The defendant contended that it appeared upon this evidence that the plaintiff was traveling upon the Lord's day, not "from necessity or charity," and so was not entitled to maintain this action. The judge so ruled, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

S. B. Allen, for plaintiff.

O. F. Choate, for defendant.

COLT, J. The plaintiff walked from his home in Boston to Charlestown on the Lord's day, for the purpose of ascertaining, from the person of whom he had hired a house, whether it had been cleaned, so that he could move into it with his family the next day; on his return, he received the injury complained of, through the alleged carelessness of the agents and servants of the defendant corporation. The question is whether, at the time of the injury, he was unlawfully traveling within the meaning of the statute which subjects to punishment by fine "whoever travels on the Lord's day, except from necessity or charity;" Gen. Stats., ch. 84, § 2; because, if he was so traveling, it is contended the law will afford him no remedy for the injury. It seems to have been conceded at the trial that such unlawful act was in this case a cause directly contributing to the plaintiff's injury.

The question is settled by the previous decisions of this court. In *Bosworth v. Swansea*, 10 Metc. 863, it was decided that a person traveling on the Lord's day could not recover for injuries received from a defect in the highway, unless he could show that he was traveling from necessity or charity, and that the burden was on him to bring himself within the excepted cases. See, also, *Jones v. Andover*, 10 Allen, 18. In *Heland v. Lowell*, 3 id. 407, it was held that a person driving across a bridge unlawfully faster than a walk could not recover for a defect in it

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caused by a hole in the floor, into which the horse stepped. In *Stanton v. Metropolitan Railroad*, 14 id. 485, one who was traveling on Sunday in a horse car from one city to another, for the purpose of visiting a stranger, and who did not show that his visit was one of necessity or charity, was held to be traveling in violation of the law, and not entitled to redress in a court of justice, for an injury which he would not have received but for such violation. In *Bennett v. Brooks*, 9 id. 118, it was declared to be the purpose of the statute to prevent all acts of a secular nature belonging to or connected with ordinary business or common worldly affairs, although they might not fall within the line of the daily business or occupation in which a person happened to be employed. And, in the line of these decisions, it was recently held that one who travels on Sunday by walking along the highway, for the purpose of seeing his employer and inducing him to change his hours of labor, in order that he may sleep better, is not traveling from necessity or charity, so as to be able to maintain an action against the town for an injury from a defect in the highway. *Connolly v. Boston*, 117 Mass. 64. See, also, *McGrath v. Merwin*, 112 id. 467.

A majority of the court think that the case is governed by these decisions, and that they compel us to the conclusion that the plaintiff, on the facts stated, does not bring himself within the clause protecting those who travel from necessity or charity; and that the illegal act of traveling on the Lord's day might properly be treated as a cause directly contributing to the injury of which he complains.

It is not easy to define as a matter of law what state of facts will make traveling an act of necessity or charity, within the exception in the Lord's day act, or when the plaintiff's own illegal conduct can be said to be a direct, rather than a remote, cause contributing to the injury. The first of these questions is to be determined to a great extent by considerations of moral fitness and propriety; the last by the evidence in each case bearing upon the complicated relations of cause and effect. In most cases, both questions should be submitted to the jury, with proper instructions. *Fetail v. Middlesex Railroad*, 109 Mass. 898. But in the present case, in the light of the cases cited, there is no evidence which would justify a verdict for the plaintiff.

Exceptions overruled.

NOTE.—See *O'Connell v. Lewiston* (65 Me. 34), 20 Am. Rep. 673; *Johnson v. Irasburgh* (47 Vt. 28), 19 id. 111; *Connolly v. Boston* (117 Mass. 64), id. 393; *Doyle v. Lynn, etc., R. R. Co.* (118 Mass. 195), id. 431; *Carroll v. Staten Island R. R. Co.* (58 N. Y. 126), 17 id. 221; *Fetail v. Middlesex, R. R. Co.* (109 Mass. 898), 12 id. 720; *Sutton v. Wauwatosa* (29 Wis. 21), 9 id. 534; *McClary v. Lowell* (44 Vt. 116), 8 id. 366; *Cratty v. Bangor* (57 Me. 423), 2 id. 56.—RUR.

Hatch v. Mutual Life Insurance Company.

HATCH, administrator, v. MUTUAL LIFE INSURANCE COMPANY.

(120 Mass. 550.)

Life insurance — death caused by unlawful surgical operation.

No recovery can be had upon a policy of life insurance, on the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. (See note, p. 542.)

CONTRACT on a policy of insurance, for \$1,000, on the life of Flora A. Hatch, the wife of the plaintiff. The policy contained the following clause:

“This policy is issued, and accepted by the assured, upon the following express conditions and agreements: 1st. If the said person whose life is hereby insured shall die by her own act, or hand, whether sane or insane, or in, or in consequence of, a duel, or of the violation of the laws of any nation, state or province, then, and in every such case, this policy shall be null and void.”

At the trial in the Superior Court, before COLBURN, J., without a jury, the issuing of the policy, the death and due proof thereof, were admitted. The judge found the following facts:

That the insured died on April 27, 1874, by reason of a miscarriage, produced by an illegal operation, performed upon her on April 16, 1874, and voluntarily submitted to by her, with intent to cause an abortion, without any justifiable medical reason.

That such an operation is dangerous to a woman's life, and was known to be so by the deceased and her husband, but that the evidence offered in this case shows that not more than about one per cent of such operations result in causing the death of the woman.

The defendant requested the judge to rule, as a matter of law, upon the facts found: 1. That a death so caused violates the condition of the policy, and thereby avoids it. 2. That, the death being so caused, there can be no recovery upon the policy, whether the facts do or do not amount to a breach of said condition. 3. That the plaintiff was so far connected with the cause of the death that he is not entitled to recover in this suit.”

The judge declined so to rule, and ordered judgment for the plaintiff for the amount of the policy; and the defendant alleged exceptions.

D. Foster & A. D. Foster, for defendant.

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H. W. Bragg, for plaintiff.

ENDICOTT, J. It appears by the bill of exceptions that the deceased voluntarily submitted herself to an illegal operation, with intent to cause an abortion, without any justifiable medical reason; that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died.

It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and by the laws of all civilized states, and known by her to be dangerous to life, did actually result in death. And the question is raised, whether, for a death so caused, the defendant is liable.

We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth. See *Amicable Society v. Bolland*, 4 Bligh (N. S.), 194; *Horn v. Anglo-Australian Assurance Co.*, 30 L. J. (N. S.) Ch. 511; *Moore v. Woolsey*, 4 E. & B 248.

It is therefore unnecessary to consider the questions raised upon the special clause of this policy, and so ably argued at the bar.

Exceptions sustained.

NOTE.—In *Amicable Society v. Bolland*, cited above, and also reported in 2 Big. Life and Acc. Ins. Rep. 290. The point adjudicated was that if a person, having an insurance upon his life, commit a felony, for which he is tried, convicted and executed, the policy is rendered void, though it contain no condition to this effect. The Lord Chancellor delivered the judgment of the House of Lords upon the following argument: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract, if available, take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connections. Now if a policy of that description, with such a form of condition inserted in it in express terms, cannot on grounds of public policy be sustained, how is it to be contended that in a policy expressed in such terms as the present and after the events which have happened we can sustain such a claim? Can we in considering this policy give to it the effect of that insertion, which if expressed in

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terms would have rendered the policy, as far as that condition went, at least, altogether void."

The only point decided in *Horn v. The Anglo-Australian Ins. Co.*, *supra*, was that a policy of life insurance was not avoided by the suicide of the insured while in an insane state; but Vice-Chancellor WOOD, after referring to the foregoing reasons of the Lord Chancellor in the *Amicable Society v. Bolland*, said: "So the argument might be pursued, although I do not know that any case has so decided, to the same extent, in the case of a person committing suicide while in a sane state of mind, thus committing a felony and losing his life thereby."

In *Moore v. Woolsey* it was said by Lord CAMPBELL, C. J., that if a man commit suicide his executors cannot recover on a policy of insurance on his life." "But," he continued, "where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterward be assigned *bona fide* for a valuable consideration or a lien upon it should afterward be acquired *bona fide* for valuable consideration, it might be enforced for the benefit of others whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives."

There is a *dictum* at the close of the opinion in *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466, in these words: "Besides this, the court was very plainly right in charging that if no such condition (against death by his own hand) had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone."

There was no pretense in that case that the insured, when he committed suicide, was insane, and the foregoing expression of the court was undoubtedly meant to apply only to a case of suicide by a sane man and in that view is clearly correct, although Mr Bigelow says of it: "The ruling that suicide will avoid a policy even if there be no condition to that effect is hardly sustained by authority." 1 Life and Acc. Ins. Co. Rep. 661. That malicious self-murder or conscious suicide will avoid a policy even though there be no condition against it was also held in *Bank of Oil City v. Guardian Mut. Ins. Co.*, 6 Leg. Gaz. 348; S. C., 5 Big. Life and Acc. Ins. Rep. 478.

It is to be observed, however, that such result flows from self-murder only when the policy belongs to the estate of the insured. In *Fitch v. The American Popular Life Ins. Co.*, 17 Am. Rep. 372; S. C., 59 N. Y. 557, the policy was taken out by the insured for the benefit of his wife and children, and there being no condition against suicide the court held that his suicide did not avoid the policy. The court said: "Although they (the wife and children) were bound by his representations and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any act or declaration done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy."—*Rep.*

CASES
IN THE
S U P R E M E C O U R T
OF
LOUISIANA.

**DERMAN V. HOME MUTUAL INSURANCE COMPANY OF NEW
ORLEANS, appellant.**

(26 La. Ann. 69.)

Fire insurance — condition forbidding transfer.

A fire insurance policy issued to a firm contained a clause rendering it void in case of its assignment or transfer without the consent of the insurer. *Held*, that this did not apply to a transfer from one partner to another of his interest in the insured property, and such transfer would not avoid the policy.*

A PPEAL by defendants from a judgment in favor of plaintiff in an action upon an insurance policy. The facts appear in the opinion.

Randolph, Singleton & Browne, for appellant.

Sambola & Ducros, for respondent.

WYLY, J. The defendants appeal from the judgment condemning them to pay the plaintiff \$865.60 on a policy of insurance issued by them to the commercial firm of Joseph H. Taboury & Co. for \$4,000 on their "merchandise, being stock in trade and on commissions contained in brick store situated on Front street, No. 27, and running back to Fulton street, No. 28." The plaintiff joins in the appeal and prays that the judgment be increased to \$731, the amount prayed for in the petition.

About four months before the fire occurred, Joseph H. Taboury retired from the firm of Joseph H. Taboury & Co., and dissolved his copartnership with the plaintiff, and it was stipulated in the act of dissolution that

* See acc. *Cowan v. Iowa State Ins. Co.* (40 Iowa, 551), 20 Am. Rep. 583.

Dermani v. Home Mutual Insurance Company of New Orleans.

the said Antonio Dermani was to take the entire stock of merchandise belonging to said firm together with the lease of the storehouse occupied by them, on the following terms and conditions: "The said Antonio Dermani promises and binds himself to pay all the debts and liabilities of said firm without exception amounting to \$3,470.09."

He also binds himself to pay the rent of said store when due, and also to pay Joseph H. Taboury the sum of \$725, \$362 thereof in cash, and the balance in thirty days. He was also authorized to collect all the claims and liquidate the affairs of the partnership. If the partnership had continued there would be no question as to the liability of the defendants for the amount claimed. But in the contract of insurance we find the following clause: "This policy is not assignable unless by consent of this corporation, manifested in writing, and in case of any transfer, either by sale or otherwise, without such consent, this policy shall from henceforth be void and of no effect." Under this prohibition the policy could not be transferred to a third party without the written consent of the insurers, so as to bind the latter or continue the risks. The question, however, is, does this prohibition apply to the assignment of the interests of one partner to the other? Was it the understanding of the parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants, on pain of forfeiting the policy? The prohibitory clause must be construed strictly. And if its application to the case before us be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance. It is true the clause expressly prohibits the transfer, by sale or otherwise, of the policy; but it does not expressly prohibit a change of interests among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other. If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument, and not left to inference; because a prohibitory clause cannot be extended by implication. Suppose Taboury had died bequeathing his interests to his partner, the plaintiff, would that avoid the policy? Would the very purpose and object of the insurance be defeated simply because one of the partners in the course of nature should die, and his interests in the policy be transferred by succession to his heir or heirs? Surely not. Because such a transfer is not within the meaning of the prohibitory clause; and because it would be absurd to suppose the parties intended the conditional obligation of the defendants to perish by the death of one of the assured, an occurrence not within their power to prevent. In the contract of insurance, like every other contract, it is the intention of the parties that must be considered. And

in the instrument before us we find nothing to warrant the conclusion that the plaintiff forfeited the policy, by accepting the assignment of his partner's interest in the business without the written consent of the defendants. In the course of business partners often become dissatisfied and change the firm by one partner transferring his interests to the other, as was done in this case. This occurrence is so common that the parties are presumed to have contracted knowing it might arise during the period of the insurance; and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument. By the assignment in question, no new party is introduced into the contract whom the defendants might not be willing to trust. In issuing the policy to Joseph H. Taboury & Co. they virtually declared the trustworthiness of each of the partners. So therefore it cannot be objected that by virtue of the assignment to plaintiff the defendants were forced to insure a person they had not consented to trust. *Wilson v. Gen. Mut. Ins. Co.*, 16 Barb. 512; *Hoffman v. Etna Ins. Co.*, 32 N. Y. 406. The other question is sufficiently answered in the written opinion of the judge *aquo*. It is clearly proved that the plaintiff has sustained the loss complained of in the petition, and he should recover the amount prayed for.

It is therefore ordered that the judgment appealed from be amended so that it will amount to \$781, and as thus amended that it be affirmed with costs.

Ordered accordingly.

MAHOOD, appellant, v. TEALZA.

(26 La. Ann. 108.)

Contract — against public morals.

Plaintiff sold furniture to defendant with knowledge that it was to be used in fitting up a house of ill fame. *Held*, in an action for the purchase-price, that the defense that the contract was one against public morals was not available.

A PPEAL by plaintiff from a judgment in favor of defendant in an action upon contract. The facts appear in the opinion.

Bentinck Egan, for appellant.

A Trudeau, for respondent.

Mahood v. Tealza.

TALIAFERRO, J. The plaintiff in this case sold to the defendant on the 6th January, 1868, a lot of furniture at the price of \$5,500 to be paid monthly, in sums of \$200 each month except for the last month, for which \$100 were to be paid. Twenty-eight promissory notes were furnished by the purchaser for these consecutive monthly payments. The contract was entered into before a notary public. It was stipulated by the parties that after full payment of all the notes the furniture was to become the property of the defendant. The plaintiff in her petition sets out that \$4,000 of the price have been paid; that eight of the notes, making \$1,500, are unpaid; that defendant refuses to pay them and has sold and disposed of a portion of the furniture and is endeavoring to make away with the remainder, to defeat the plaintiff's rights and to defraud her of all recourse for payment of the remainder due her on the contract. She prays judgment, recognizing her as the owner of the furniture, and that she recover possession of the same, or that she have judgment for the amount of the eight unpaid notes with privilege upon the property. The plaintiff caused the furniture to be sequestered, and subsequently released it by entering into bond and taking possession of it, the defendant having failed on her part to do so. The answer is a general denial. The defendant admits having purchased certain furniture from the plaintiff, but avers that she was induced to do so by the fraudulent representations of the plaintiff, in regard to the cost and value of the furniture, and that defendant was, through error on her part and fraud on the part of the plaintiff, induced to enter into the agreement to pay a price greatly exceeding the value of the property. But the defendant obviously places her defense mainly upon the ground of the alleged illegality of the contract growing out of its violation of morals and public order. She avers broadly, and has made the averment good, that both she and the plaintiff were at the time of the contract, keepers and managers of public houses of prostitution; that the large lot of furniture purchased by defendant from plaintiff, was sold by the plaintiff and bought by the defendant with the express knowledge and purpose of both, that it was to be used in houses of that character. The defendant, avowing her own infamy, invokes the maxim *ex turpi pacto nil oritur actio*. Upon the ground that the contract was one *contra bonos mores* the court below set aside the sequestration and dismissed the suit. The plaintiff has appealed. The defendant in her answer to the appeal asks an amendment of the judgment by ordering that the property sequestered be restored to her, and reserving to her recourse on the sequestration bond.

In the case of *Hubbard v. Moore*, 24 La. Ann. 591; S. C., 13 Am. Rep.

128, the plaintiff sold furniture to the defendant, a keeper of a house of ill fame, with the knowledge that it was to be used in that house by the defendant. So in the case of *Sampson v. Townsend*, 25 La. Ann. 78, the plaintiffs were aware of the destination of the furniture sold by them to the defendant, the keeper of a brothel. In these cases the court held that the knowledge of the plaintiffs of the immoral use for which the furniture was purchased did not vitiate the contract.

In the case now before us we see no reason why the same principle should not hold. We must, therefore, rejecting the plea of *contra bonos mores*, examine this case on the merits and determine it according to the law and evidence. The plaintiff we think has not clearly made out her allegation, that a large part of the furniture in question was clandestinely sold and disposed of by the defendant. The petition refers to an informal inventory of furniture made as appears by its date on the 1st of June, 1861, and contrasting with it the inventory made by the sheriff at the time of the seizure under writ of sequestration, the plaintiff aims to show a large deficit in the amount. We do not see that this is conclusive. The inventory of 1st June, 1867, annexed to the petition, is not signed by any one and upon its face simply recites that it is a list or inventory of "furniture in houses No. 80 Basin street." This, it is shown, is one of the two houses which it seems contained furniture purchased by defendant; but the evidence does not sufficiently identify it as the same purchased by the notarial act passed six months afterward. In that act it is declared that "sale is made of all the furniture in houses 80 and 28 Basin street, the purchaser being aware of every article therein contained dispenses with enumerating them in this act." It is clearly shown that, about the time the sequestration was taken out, the defendant was endeavoring to sell all the furniture which the plaintiff, under the terms of the contract, claims to belong to her. Eight notes amounting to \$1,500, it is shown, remain unpaid. For this sum the plaintiff should have judgment with privilege as claimed.

There are two bills of exceptions in the record, taken by the plaintiff to the admission of evidence to show the immoral character of the contract. It becomes unnecessary under our view of the case to examine them.

It is therefore ordered that the judgment of the District Court be annulled, avoided and reversed. It is further ordered and decreed that the plaintiff have judgment against the defendant for \$1,500. That her lien and privilege upon the property sequestered be recognized and enforced, and that the same be sold to pay the aforesaid sum, the defendant paying costs in both courts.

Ordered accordingly.

Phillips v. Louisiana Equitable Life Insurance Company.

PHILLIPS v. LOUISIANA EQUITABLE LIFE INSURANCE COMPANY,
appellant.

(26 La. Ann. 404.)

Life insurance — conditions avoiding policy — suicide by insane person.

A life insurance policy contained a clause avoiding it if the insured "should die by his own hands." *Held*, that suicide by the insured while insane would not avoid the policy.

A PPEAL by defendant from a judgment in favor of plaintiff in an action upon a policy of life insurance. The facts appear in the opinion.

Breaux, Fenner & Hall, for appellant.

Cotton & Levy and *A. B. Phillips*, for respondent.

LUDELING, C. J. This action was instituted to recover the amount of a policy of insurance on the life of H. F. Morse, issued on the 4th of October, 1867. Morse died at Abbeville, Louisiana, on the 15th of March, 1870. Proof of his death was made by his widow, and payment was declined on the grounds that the proof furnished of the death also proved he had committed suicide, and that the policy excepted liability of the company "if he should die by his own hands."

The questions presented for solution are new in this State. They are, first: What is the meaning of the exception, "if he die by his own hands?" Second — Did the assured take his own life, and was the policy avoided thereby?

1. It is evident the words cannot be interpreted in their literal sense, for they would exempt the company from liability if the insured came to his death by the accidental discharge of a gun or pistol in the hands of the insured, or if he took poison through mistake. While they would not exempt the company from liability if the insured were to commit suicide by jumping from a precipice or into the river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words. C. C. 1945, 1950. This common intent we think was to exempt the company from liability for the voluntary self-destruction of the insured by whatever means accomplished. The defendant ingeniously argues that the clause or proviso of the policy should be interpreted to mean any suicide, and especially suicide superinduced by in-

Phillips v. Louisiana Equitable Life Insurance Company.

sanity, as the suicide of one not insane would be such a fraud upon the company that the insured could not recover even in the absence of the proviso; and he cites the case in 21 Penn. St. 466, *Hartman v. Keystone Insurance Company*. We cannot agree with him. We do not believe the parties intended to exempt the risk that the insured might become insane and might, when in that state, commit suicide. But we think that it was to guard against the possibility of the very fraud spoken of by the counsel that the clause was inserted in the policy. The test of responsibility in civil, as well as in criminal cases, is the state of the actor's reason or mental faculties. 4 Bl. Com. 22, 189, C. C. Art. 1788, 1789. Therefore, if the defendant were insane when he committed the act of self-destruction, no responsibility attached to his act.

2. Did the insured die by his own hand? The onus of proof is on the party who affirms this fact. And we do not think it has been legally proved. It is true that the witnesses who testify as to his death express it as their opinion that he killed himself or committed suicide; but their opinions cannot be regarded as evidence of the fact. Nor do the facts and circumstances proved point to the voluntary self-destruction of the insured to the exclusion of all other reasonable hypothesis. All the facts and circumstances proved in regard to his death, are that he retired to his room at bedtime and about one o'clock at night the report of a pistol was heard. When the inmates of the house came to the room, the insured was found in a reclining posture on the sofa, and a pistol was lying on the floor near by. He had been shot in the mouth. It is possible that he might have shot himself accidentally, or that an enemy might have found him sleeping with his mouth open and shot him in the mouth to avert suspicion. The evidence being circumstantial only, proves nothing, since it does not exclude all other reasonable hypothesis.

But if that fact were established the plaintiff has proved that the deceased was insane at the time of and before his death. See Reynolds on Life Insurance, 105 *et seq.*; *Mutual Life Insurance Company of New York in error v. Terry*, decided by the Supreme Court of the United States in April, 1873.

It is, therefore, ordered and adjudged that the judgment of the lower court be affirmed, with cost of appeal.

Rehearing refused

State *ex rel.* Warmoth v. Graham.

STATE *ex rel.* WARMOTH v. GRAHAM, appellant.

(26 La. Ann. 568.)

Constitutional law — vacancy in office of governor.

The Constitution of Louisiana provides that in case of "absence from the State" of the governor, the powers and duties of his office shall devolve upon the lieutenant-governor. *Held*, not to refer to a mere temporary absence, and the fact that the governor was at a place out of the State, but within a few hours' ride of the capital, for a period of twenty-one days, did not authorize the lieutenant-governor to exercise the functions of governor.*

A PPEAL by defendant from judgment in favor of relator in proceedings to compel payment of official salary. The facts appear in the opinion.

Hornor & Benedict, for appellant.

Semmes & Mott and *William Grant*, for relator.

LUDELING, C. J. The relator avers that his salary as governor of the State was due him for the periods from the 6th to the 19th of May, 1871, and from the 26th of June to the 17th of July, 1871; that he drew his warrant therefor, on the auditor of public accounts, on the 22d of September, 1871; that payment of this warrant was refused on the grounds that the relator was absent from the State during said periods, and that the duties and prerogatives of governor devolved on the lieutenant-governor, to whom the salary of governor for said periods had been paid. There was judgment in favor of the relator, and the defendant appealed.

The question to be decided is, does the absence of the governor from the State for a few hours or a few days create a vacancy in this office and authorize the assumption of the duties, prerogatives and emoluments thereof, by the lieutenant-governor, during said absence.

The constitutional provisions on the subject are contained in articles 53 and 54 of the Constitution. Article 53 says: "In case of impeachment of the governor, his removal from office, death, refusal or inability to qualify or to discharge the powers and duties of his office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the lieutenant-governor, for the residue of the term or until the

* Compare *People v. Parker*, 19 Am. Rep. 634.

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governor, absent or impeached, shall return or be acquitted, or the disability be removed," etc. Article 54 declares that the officer discharging the duties of governor during his administration shall receive the compensation to which the governor would have been entitled. It is evident, if the lieutenant-governor be authorized to exercise the functions of the governor during any temporary absence of the governor from the State, he may also whenever the governor is unable to attend to the duties of his office on account of sickness — in case "of inability to discharge the powers and duties of his office." We do not believe this to be the meaning intended by the framers of the Constitution. The inability to discharge the duties of the office as well as the absence from the State, spoken of in the article, are such as would affect injuriously the public interest. The mere absence, at Pass Christian, within a few hours' run of the capital, could not, by any possibility, affect the public interest.

How is the absence of the governor to be ascertained? It is manifest that there ought to be some certain proof, accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as governor of the State. As the law makes no provision for the mode in which the governor shall manifest to the public his absence from the State, it necessarily is left to his discretion subject to his responsibility to the people, and if the interests of the State should suffer in consequence of his prolonged absence, he would be amenable to public sentiment and to the control of the impeaching power of the State. Some public record should be made of the intended absence, or the governor should publicly place the lieutenant-governor in charge of the government, so that the time of absence shall appear of record, and during such absence the acts of the acting governor would be of unquestionable validity. Any thing less than this might create confusion and uncertainty. We do not think it was ever contemplated that the movements of the governor should be watched, with the view that the lieutenant-governor or speaker of the House of Representatives should slip into his seat the moment he stepped across the borders of the State.

And it is, therefore, ordered that the judgment of the lower court be affirmed with costs.

Rehearing refused.

City of Shreveport v. Levy.

CITY OF SHREVEPORT v. LEVY, appellant.

(28 La. Ann. 671.)

Constitutional law — religious discrimination.

A municipal ordinance forbade the sale of goods on Sunday but excepted from its operation those keeping their business places closed on Saturday. *Held*, unconstitutional, as giving to Jews a privilege denied to others.

A PPEAL by defendant from a judgment imposing a penalty for the violation of a city ordinance. The facts appear in the opinion.

Nutt & Leonard, for appellant.

No counsel named for respondent.

MORGAN, J. The defendant appeals from a judgment condemning him to pay a fine of \$10 for having violated an ordinance passed by the authorities of the city of Shreveport. The ordinance violated provides that all business houses in the city of Shreveport shall be closed on Sundays from and after nine o'clock A. M., and that it shall not be lawful for any persons doing business in that city to sell any thing in the usual course of their business during the time and hours above mentioned, provided "that this ordinance shall not apply to drug stores, hotels, barber shops, restaurants and livery stables." If the ordinance stopped here perhaps it might do very well. But it goes on and provides further that it shall not apply to any person or persons doing business in the city who close up their places of business on Saturdays, and keep them closed during the whole day. It is admitted in the record that a large proportion of persons engaged in mercantile pursuits in the city of Shreveport are Jews, many of whom observe the Jewish Sabbath.

Before the Constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a city council which gives to one sect a privilege which it denies to another, violates both the Constitution and the law and is therefore null and void.

It is, therefore, ordered, adjudged and decreed that the judgment of the Recorder's Court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

Ordered accordingly.

Banning v. Bleakley.

BANNING v. BLEAKLEY *et al.*, appellants.**(27 La Ann. 257.)*****Fiduciary debt — factors and commission merchants.***

The obligations contracted by factors and commission merchants when acting as such are fiduciary within the meaning of section 33 of the U. S. Bankrupt Law of 1867, and a discharge in bankruptcy does not relieve from them.*

A PPEAL from a judgment in favor of plaintiff in an action to recover proceeds of sale of personal property made by defendants as factors. The facts appear in the opinion.

Lacey & Butler and Samuel P. Blanc, for appellants.

Mc Goin, Kleinpeter & Nixon, for respondent.

TALIAFERRO, J. Suit is brought against the defendants for \$1138.33, alleged to be proceeds of a sale of one hundred and sixty boxes of cheese and fifty kegs of butter, consigned by plaintiff to the defendants, to be sold by them on plaintiff's account, as his agents and factors, and which, as plaintiff alleges, was sold by the defendants in their fiduciary capacity as his agents, who have failed to account to him for the proceeds, and have illegally and fraudulently converted the same to their own use and benefit. He claims from the defendants the said sum of \$1,138.33, with legal interest from the 13th July, 1867. The defendants admit that on the 13th July, 1867, they were indebted to the plaintiff in the sum of \$1,138.33, but deny that they owe them any thing now; that they have been forever released and discharged from all liability to plaintiff on account of the alleged indebtedness, by their discharge in bankruptcy by decree of the United States District Court for the district of Louisiana, rendered on the 13th January, 1869, and they specially plead their discharge in bar of plaintiff's claim. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

In this case the following inquiry arises: Does a consignee in selling goods consigned to him for sale on commission, act in a fiduciary capacity, according to the meaning and intendment of the thirty-third section of the bankrupt law of the United States, enacted in April, 1867, and is the obligation he is under to faithfully account for and pay over to his consignor the proceeds of the goods thus sold, one from which he is relieved by a discharge in bankruptcy? The thirty-third section of the

* See *acc. Lemcke v. Booth* (47 Mo. 385), 4 Am. Rep. 326; *Cronin v. Cotting* (104 Mass. 245), 6 id. 232.

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act of Congress approved March 2, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," provides "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint-contractor, indorser, surety or otherwise." The terms and phraseology used in the bankrupt act of 1841 in treating of the same subject-matter are to some extent unlike those just quoted from the act of 1867, and no small difference of opinion exists as to whether the words and expressions employed in the thirty-third section of the act of 1867, are to be construed as having the same meaning and import that are conveyed by those used in the first section of the act of 1841. The first section of that act provides that "all persons whatsoever, residing in any State, territory or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, shall, on compliance with the requisites of the bankrupt law, be entitled to a discharge under it.

The Supreme Court of the United States, in its interpretation of the act of 1841, in the case of *Chapman v. Forsythe*, 2 How. 202, decided that a factor is not within the act, because "the cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian, or trustee,' are not cases of implied, but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract." On the part of the defendant it is argued that the case of *Chapman v. Forsythe* is conclusive of the questions raised in this litigation, the defendant holding that the provisions of the thirty-third section of the act of 1867 are substantially the same as those of the first section of the act of 1841 in regard to fiduciary trusts. In support of this position he refers us to the cases of *Cronan v. Cotting*, decided by the Supreme Court of Massachusetts in 1870, a case arising under the bankrupt act of 1867, in which that court said: "Our conclusion is, that this provision of the bankrupt act of 1867 (relating to fiduciary trusts) was framed in view of, and with the intent to adopt the construction which the Supreme Court of the United States had put upon the similar clause in the bankrupt act of 1841. We adhere to that construction as applicable to the

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act of 1867, until the same court shall declare otherwise." The facts of this case were that Cronan, the plaintiff, delivered accepted bills of exchange to the defendant, as administratrix of her husband's estates with directions to collect them and apply so much of the proceeds as might be necessary to the payment of debts owing from him to the estate, and to pay over to him the remainder. The court held that the phrase "fiduciary character" did not include the obligation of the administratrix to dispose of the bills of exchange and apply the proceeds according to the directions of the plaintiff. In the case under consideration we are referred by the defendant's counsel to the case of *Grover & Baker v. Clinton*, 8 Nat. Bank. Reg. 312, decided in the United States Circuit Court for the Western District of Wisconsin, in 1873, in which it was held: "That money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a fiduciary capacity within the meaning of the bankrupt act; that a bankrupt is not liable to arrest on such a debt, and that it will be discharged in bankruptcy."

In behalf of the plaintiff, on the other hand, it is contended that the benefits arising from bankrupt laws are intended for the honest but unfortunate debtor, but they cannot avail him who, having the goods of another confided to him, converts them into cash, and, instead of considering money so obtained as a sacred deposit, mingles it with his own funds and with it redeems his own obligations. A distinction is drawn between an ordinary debt and a debt of the character on which the plaintiff sues in this case. In one case it is held that the reliance is upon the solvency of the debtor, and upon the sufficiency of his assets to meet his debts; in the other it is upon his probity and moral responsibility. In the one case the creditor takes the risk of substituting the credit of the debtor for the goods which are sold to him, and vests in him the absolute title to the goods; in the other the depositor parts with none of his rights in the goods deposited, but simply intrusts them to the depository for a specific disposition to be made of them. In favor of the construction maintained in behalf of the plaintiff, we are referred to several decisions by tribunals of last resort in some of our sister States.

In the case of *Whitaker v. Chapman*, 3 Lans. 155, plaintiff sued to recover from defendants, who were partners and factors, or commission merchants, doing business in the city of New York, the proceeds, less commissions of one hundred and fifty-two boxes of cheese, which the plaintiff claimed to have delivered to the defendants to be sold for cash, with immediate return of proceeds to him. The defendants denied that the cheese had been delivered to them to be sold for cash, and claimed

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to have received the cheese for sale with a guarantee to the plaintiff of payment for the sales made by them according to the custom of their trade, and they severally set up a discharge in bankruptcy. It was proved in this case that the commodity was received by the defendants to be sold by them on commission ; that it was sold by them ; that there was a balance due the plaintiff of the net proceeds, which had not been paid over, but had been converted to their own use. It was held by the court that the defendants, in the receipt and sale of the cheese, acted in a fiduciary character on behalf of the plaintiff, and that the discharge in bankruptcy of the defendants, and each of them, did not discharge them or either of them from the debt.

In the cases of *Duguid v. Edwards*, 50 Barb. 290, the plaintiff sent a quantity of flour to the defendants, who were commission merchants at Albany, to be sold by them in the course of their business. They sold a portion of the flour at Albany, shipped a part of it to New York, which was sold there, and returned the residue on hand to the plaintiffs, when the defendants failed in business. For the non-payment of a balance of \$211 remaining in their hands from the proceeds of the sale actually made by them, and for the value of one hundred and fifty barrels of flour sent to New York and sold there, the proceeds of which were never returned to the plaintiffs, an order of arrest was taken against the defendants. In their defense they set up certain usages and circumstances from which they claimed that their relations to the plaintiffs were not those of ordinary factors, but were substantially those of debtor and creditor ; that when they received the flour they were carrying on a general commission business at Albany. When property was consigned to them for sale they paid the freight and other charges against it, and when they sold it they did so in their own names, either separately or with other property of the same description belonging to other parties, as might prove convenient and suitable for their customers, receiving payment for it in gross, and crediting the plaintiffs their proportion of the purchase-price ; that they deposited the proceeds of their sales in general accounts without distinguishing the portions owing from the sales of the property of every particular individual, and in making payments to their principals or consignors, they did so by accepting and paying the drafts drawn by them for the balances appearing by way of credits upon their books, or by remittances made directly to them. From this mode of transacting their business, and which the defendants showed was followed by others engaged in the same business at Albany and other commercial cities, the defendants insisted that the moneys they received from the sale of the plaintiff's flour became their property

instead of the property of the plaintiffs, and they became indebted simply to the plaintiffs for the balance remaining in their hands after their advances and commissions were deducted. The court after discussing at considerable length the relations existing between the principal and the factor decided that "where a particular mode is adopted and pursued for the transaction of the business of another, with his knowledge and assent, he will be concluded by it, and subject to all the consequences resulting from it. But where that differs from the settled duties and obligations established by law, such knowledge and assent must be shown before the party intrusting his business to another can be affected by the change; that commission merchants to whom property is consigned by the owner are the factors of the owner. They do not acquire any title or interest in the property itself beyond a mere lien for their advances in paying the expenses of its transportation to them. If they have actually made further advances upon the faith of consignments made to them, that will give them no title to the property, but will merely increase the extent of their lien. When they sell the property, even though they do so in their own names, and may consequently be regarded by the purchaser as the owner of it as between themselves and the consignors, they will be deemed as selling as the agents of the latter, and as selling their property. There is nothing in such a transaction which will vest the factors with the title to the proceeds derived from such sales. On the contrary, they will receive such proceeds as the substitute or representative of the property sold, subject to the same lien, under the trust, implied of course, that the excess beyond what shall be required to discharge such lien will be held for and paid over to the consignors. If the factors mingle such proceeds of sales with their own funds, by depositing them in the bank to their credit in a general account, use the money in their business generally, and fail to pay over the same on demand, they thereby subject themselves to the legal liabilities arising from the misapplication of another's property, and to arrest under the provisions of the Code, as having received the money in a fiduciary capacity. The understanding of the legislature seems to have been that factors, agents, and brokers, when acting in their capacities as such, are acting in fiduciary capacities, and they have accordingly provided for their arrest, as well as for the arrest of all other persons who may receive and misapply moneys received by them in the course of their fiduciary relations. Customs and usages which would have the effect of relieving a party from the duties and obligations the law would otherwise impose upon him, are not allowed to prevail unless the actual assent of the other party is secured for their observance, or they are of so noto-

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rious a character as reasonably to lead to the conclusion that he must have known of their existence and intended to assent to them. And even then they must not be unreasonable nor positively unlawful. That the usage or custom itself will not be sufficient to deprive a party of the rights otherwise secured to him by law, is so well established by the decisions as to need only a reference to them to confirm that conclusion. 14 Johns. 316; 1 Seld. 95, 101, 102; 16 N. Y. 392, 401, 402; 34 id. 413.

That a commission merchant or a factor stands in a fiduciary relation to his principals, within the meaning of the bankrupt act of 1867, was decided by the Supreme Court of Missouri, in the case of *Lemcke v. Booth*, 47 Mo. 387. In that case the court said: "The question is here presented whether a factor or commission merchant stands in a fiduciary relation to his principals in respect of the proceeds of sales of commission goods within the meaning of section 33 of the bankrupt act of 1867. The section provides that no debt created by fraud or embezzlement of the bankrupt or his defalcation as a public officer, or while acting in any fiduciary character shall be discharged under this act." The corresponding provision in the bankrupt act of 1841 excluded from its benefits all persons owing debt, created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." The "fiduciary capacity" here mentioned was held by the Supreme Court of the United States to refer to technical trusts of the character of those previously mentioned, and not to trusts raised by implication of law. It was, therefore, held that an indebted factor or commission merchant was not a fiduciary debtor within the meaning of the act of 1841. *Chapman v. Forsyth*, 2 How. 202. But the above-recited provisions of the two acts (of 1841 and 1867) are quite dissimilar. BLATCHFORD, J., in *Matter of Seymour on habeas corpus*, 6 Int. Rev. 60, distinguishes the two provisions, and comments upon *Chapman v. Forsyth* as follows: "The Supreme Court held that a discharge under the act of 1841 did not release the bankrupt from any such debts (as were mentioned in the clause of the act of 1841 above quoted), and that no debt fell within the description of a debt created by a defalcation while acting in any other fiduciary capacity, unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held that the language of the act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacity of a specified standard and character. That was clearly so under that act. But in the act of 1867 the language seems to have been intentionally

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made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity." "Therefore, under the act of 1867," says the judge, "no debt created by the defalcation of a bankrupt while acting in any fiduciary capacity, will be discharged." These views are approved by NELSON, J., in his decision *In re Kimbal*, 6 Blatchf. 292. A commission merchant acts in a fiduciary capacity, and the trust attaches to the goods consigned to him for sale on commission, and to their proceeds when the goods are sold. *Chapman v. Forsyth*, *supra*; *Duguid v. Edwards*, 50 Barb. 288. Concurring in the views of Judge BLATCHFORD as above quoted, the judgment will be affirmed."

The case in 6 Blatchf. 292, *In re Kimbal*, was decided in the Circuit Court of the United States for the second circuit by Judge NELSON, associate justice of the Supreme Court of the United States. The defendant had received a quantity of buckwheat flour to sell on commission and remit the proceeds less the commission. The flour was sold and the defendant received \$758.79 over and above the commission, but no part of the proceeds was paid over. Soon after, the defendant applied for the benefit of the bankrupt act, having applied the money to his own use. Mr. Justice NELSON said: "Looking at it (the case) as thus presented, it seems to me there is great difficulty in saying that the flour was not received and held by the bankrupt in a strictly fiduciary character. The article was placed in his possession simply to sell it and to remit the proceeds over and above his commission. The money was not the bankrupt's when it was received on the sale, but was the money of the owner of the flour. It was a gross breach of trust to apply it to his own use. I have looked at the case of *Chapman v. Forsyth*, 2 How. 202, but do not regard it as controlling the one in hand. The provision in the present act is much broader than in the act of 1841."

The factor or commission merchant receiving from the owner property consigned to him to be sold, and the proceeds to be returned to the owner, or kept for his disposal, we can regard in no other light than that of acting in a fiduciary capacity. The doctrine contended for as arising from custom and usage, that the property consigned, or its proceeds, become the property of the factor, for which he simply becomes the debtor of the owner, has no foundation in equity or reason. The party consigning his property to the care of another, and placing it at his disposal for the benefit of the owner, is not presumed to recognize any such doctrine. The natural and obvious presumption is that the consignor confides in the probity and the sense of justice and honor of his factor, that he will dispose of the property sent to him for sale to the best interests of the owner, and that he will securely keep and return

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to him, when required, the money for which the property was sold, after deducting the expenses and a fair compensation for his services in disposing of it. Every prudent dealer seeks to have the greatest amount of security practicable in his business affairs. Such a person would surely feel more secure when relying upon the simple obligation of the agent to securely keep and return to him the money in his hands the proceeds of sale of his property, than to know that such proceeds were intermixed with the moneys of the agent, and to be used by him as his own, leaving the principal to rely solely on the credit and responsibility of the factor, thus taking all the risks and casualties of trade which might overwhelm his factor in bankruptcy and financial ruin, and throw upon himself the loss of the property intrusted to his factor. To exonerate the factor from liability on the ground of his passing over to his general account the proceeds of the property of the consignor, and becoming the debtor of the latter for such proceeds, it is well established, as we have seen, that it must be shown that the owner or consignor knew of such custom and usage, and assented to it. The custom insisted upon by the defendants as prevailing in this respect in New Orleans is not proved to have been known by the defendant, and that he assented to it.

We conclude that factors and commission merchants when exercising their functions of receiving, selling, taking their commissions, and accounting to their principals, are acting in a fiduciary capacity within the meaning and intendment of the thirty-third section of the bankrupt law of 1867, and are not relieved from obligations contracted in that capacity by a discharge in bankruptcy. In this conclusion we think we are abundantly sustained by the decisions and authorities we have adverted to.

It is, therefore, ordered that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

STATE OF LOUISIANA v. TAYLOR, appellant.

(27 La. Ann. 393.)

Criminal law — proceedings at sentence.

Asking a person convicted of a crime not capital, before sentence, if he has any thing to say why sentence should not be pronounced against him, is not necessary though usual.

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A PPEAL by defendant after conviction and judgment upon a charge of horse stealing. The facts appear in the opinion.

Nichols & Pugh, for appellant.

M. Marks, District-Attorney, for the State.

LUDELING, C. J. The defendant and appellant in the above suit has been tried and convicted of horse stealing, and from a judgment sentencing him to two years' imprisonment in the penitentiary, he has taken his appeal.

Defendant assigns for error : First, that the record does not show that the defendant was present in court during the various stages of the trial. Second, that the record does not show that the accused was asked, before sentence, if he had any thing to say why sentence should not be pronounced against him.

1. We think the record does show that the accused was present during the trial. He was arraigned and pleaded not guilty. During the course of the trial, several bills of exceptions were taken to the rulings of the judge, and after conviction he filed a motion for a new trial.

2. The transcript, which is very badly made up, does not show that the accused was asked if he had any thing to say why judgment should not be pronounced against him. But we do not consider this ceremony necessary, though usual, and perhaps prudent in cases not capital. 4 Bl. Com. 375; 2 Hale's P. C. 401, 407, 408; 1 Chit. Cr. Law, 720; *West v. State*, 2 Ala. 212; Archibold's C. P. 676.

3. The regular venire drawn for the term was set aside on objections urged by defendant, that it had been drawn under the act of 1873, instead of that of 1868, and the special venire shows that it was drawn under an order of the judge commanding the same. The refusal of the judge to permit the accused to contradict the official acts of the clerk by his parol evidence, was proper.

It is, therefore, ordered that the judgment of the lower court be affirmed, with costs of appeal.

Rehearing refused.

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CITY OF NEW ORLEANS, appellant, v. STAFFORD.

(27 La. Ann. 417.)

Constitutional law — act forbidding private markets.

An act of the legislature provided that there should not be any private market kept within twelve squares of a public market in the city of New Orleans. *Held*, not unconstitutional either as taking away the property of those keeping private markets at the time of the passage of the act within the prescribed limits or as taking away the vested rights of those holding licenses to keep such markets.

A PPEAL by plaintiff from a judgment in favor of defendant in an action brought to restrain defendant from maintaining a private market. The facts appear in the opinion.

Lacey & Butler, for appellants.

E. Filloul, for respondent.

TALIAFERRO, J. It is charged against the defendant that in open violation of existing laws and regulations appertaining to the markets of the city for vending provisions of various kinds for the sustenance of the inhabitants, he is keeping a private market, at which he is selling meats and other articles of provisions contrary to the said laws and municipal regulations, and thereby endangering the peace and good order of the city, putting in jeopardy the cleanliness and salubrity and the health and quietude of the inhabitants thereof, and furthermore subjecting the said city to a pecuniary loss and injury in an amount greatly in excess of \$1,000. The plaintiff prayed that an injunction be granted restraining the defendant from keeping open and conducting a private market, as, alleged by the petitioner, the defendant is doing in violation of law.

A rule was served upon the defendant to show cause why the injunction prayed for should not be granted, and the defendant answered : that the act of 1874 of the legislature providing that no private market should be permitted at any place in the city within the distance of twelve squares of a public market, is unconstitutional and void, because it was procured by bribery and corruption ; because its title does not disclose or indicate its purposes ; that it violates the Constitution of the United States ; because it creates an involuntary servitude ; that it abridges the privileges and immunities of the citizens ; that it deprives them of their property without due process of law. The defendant contends that having taken his license under the act 134 of 1866 he is entitled to keep a

private market at the corner of St. Peter and Decatur streets during the space of one year beginning January 1, 1874, and ending 31st of December, 1874; that this right having once vested it cannot be taken away. He further contends that the city is without interest, having sold the revenues of the markets for the year 1874. The application of the plaintiff for an injunction was dismissed at his cost, and the plaintiff has appealed.

The act of the legislature authorizing private markets for the sale of meats, fish, poultry, etc., was passed in 1866; that act directs that keepers of private markets shall pay the same license that is required from retailers of provisions. The words of the statute are: "From and after the 1st of January, 1867, it shall be lawful for all persons, after they have obtained the license required for retailers of provisions, to open, and keep open at all proper hours of the day, private markets, stores, or stands in any part of the city of New Orleans for the sale of meats, game, poultry, vegetables, fruit and fresh fish, subject to the general sanitary ordinances of the city council." By the act of 1870, enlarging the limits of the city of New Orleans, and to provide for the government and administration of the affairs of the city, power is granted to the city to establish market places and through its department of commerce to have general superintendence of all matters relating to markets. The city council is vested with full power and authority to make and pass such by laws and ordinances as are necessary and proper "to regulate and preserve the peace and good order of the city and maintain its cleanliness and salubrity not inconsistent with any law relating thereto." On the 2d of December, 1873, the city council passed an ordinance making the license for private markets \$300. On the 26th of February, 1874, the defendant in this case took out from the State a wholesale dealer's license on the payment of \$100. This license was taken out near three months after the passage of the city ordinance requiring a license of \$300, from the keeper of private markets. In the same ordinance the license of wholesale dealers is fixed at \$100.

If the defendant was bound to take a license from the city for keeping a private market it is clear that he has not done it. But he relies upon the license from the State under the statute of 1866. This statute, as to the amount of the license fixed for private markets, is not quite definite — the license is to be that which is paid by "retailers of provisions." We do not find from the record nor from the statutes of 1866 what the amount of that license was. We assume, however, that the defendant holds that his license as a wholesale dealer covers it, whatever it may be. Considering the act of the legislature of 1866, together with

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the ordinance of the city of 2d December, 1873, passed more than two months before the date of the defendant's license, we cannot but consider his claim to a license for the year 1874 at best as very questionable.

It is not important that we should pass directly upon the question. A prominent ground of defense, and one upon which the judge *quo* seems to have laid much stress is, that the city is without interest in the matter, having leased or farmed out the markets for the year 1874. We do not see that it follows because the city has leased the markets for the year 1874, it loses all the interest in the management of them, in seeing that the laws and regulations concerning them are carried into effect. The act of 1874 makes it the duty of the city through its administrator to take measures for carrying out the provisions of the act regulating private markets, and in any issue that may arise in acting under this authority the city would be competent to stand in judgment.

We pass now to the consideration of the most important question raised in this controversy. Has the legislature the power to make the regulation which it has made by this act of 26th February, 1874, declaring that private markets shall not be established, continued, or kept open within twelve squares of a public market? This question we think must be answered in the affirmative. And the power arises from the nature of things, and is what is termed a police power. It springs from the great principle, "*salus populi suprema est lex.*" There is in the defendant's case no room for any well-grounded complaint of the violation of a vested private right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness, and salubrity.

By way of illustrating this necessarily existing power to regulate the number, location, and management of markets, take the city of New Orleans, in a warm climate, located in a low district of country surrounded by marshes and swamps, which, in the hot season, under favorable conditions, envelops its large population in a malarious atmosphere. Under such circumstances the danger of epidemics becomes imminent. It behooves the city authorities at such periods to be on the alert to obviate local causes of disease within the limits of the city. Among such causes the decay of animal and vegetable matter is a prominent one. The markets, therefore, must on that account be strictly attended to, and such measures adopted in regard to them as, in the judgment of the proper authorities, the public health may require. Suppose under such a condition of things it should be found necessary as a sanitary regulation

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to reduce the number of markets, to abolish some of them, and thereby avoid their becoming causes of disease. Suppose the lessee of a public market and the keeper of a private market should find the markets under their control abolished, closed or suspended, from considerations of public security and benefit, before the expiration of the time for which their licenses were to continue; could they be sustained by law in a demand to be permitted to continue and keep open the markets they had charge of, on the pretense that they had a vested right to keep them open? Surely not. Their private benefit and advantage would have to yield to the public advantage. It would be a perversion of the principles of organized society and of regulated liberty to permit an individual to continue a business or occupation endangering the public health in order that he might derive profit from such occupation. We presume it will not be denied that under circumstances of peril and emergency the law-maker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively for prevention as well as *pro re nata* for immediate effect. It is within his discretion when to exercise this power; and persons under license to pursue such occupations as may, in the public need and interest, be affected by the exercise of the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power.

The act of the General Assembly of 26th February, 1874, entitled "An act to regulate the private markets in the city of New Orleans and for other purposes," does not violate or infringe any vested right. It is not unconstitutional.

The defendant charges that the passage of the act was procured by bribery and corruption; that it was conceived in fraud, and its title designed to defraud. This is *coram non judice*. Courts will not be influenced by mere allegations of this kind, unsupported by any evidence whatever, to disregard the maxim "*omnia praesumuntur recte esse acta*."

(The remainder of the opinion is devoted to the consideration of the question whether the act expresses its objects in its title within art. 114 of the State Constitution).

Judgment for plaintiff.

WYLY and HOWELL, JJ., dissented.

Burke v. Bishop.

BURKE, executrix, v. BISHOP, appellant.

(27 La. Ann. 465.)

Gift causa mortis — of check on bank.

On the day before he died plaintiff's testator delivered to defendant, with the intention of giving it to her, a bank check drawn by another to testator's order and indorsed in blank by him. The check was not presented for payment until after testator's death. *Held*, a valid gift.

APPEAL by defendants from a judgment in favor of plaintiff in an action to recover the proceeds of a check alleged to be wrongfully converted. The opinion states the facts.

J. A. Campbell, J. S. Whitaker and E. Bermudez, for appellants.

Labatt, Aroni & Clinton, for respondent.

MORGAN, J. Plaintiff, in her representative capacity, seeks to recover from the defendants \$1,434.47, amount of a check drawn by Britton & Kountz, to the order of Hampton Elliot and by him indorsed in blank and which she alleges the defendants embezzled and misappropriated. There was judgment in favor of the plaintiff. As regards Mrs. Bishop, the record shows that she was a married woman when the suit was instituted and she was not authorized to stand in judgment by her husband or by the judge. As to her, therefore, the judgment was not authorized. In respect to Mrs. Risley, her co-defendant, she claims that the check was a manual gift from Elliot to herself and that she cannot be forced to return it.

The facts are that Elliott gave the check to Mrs. Risley on the 27th of March, 1872. On that day, in the afternoon before three o'clock, Mrs. Bishop gave the check to a visitor at the house who had transacted other business for her, and requested him to have it cashed. He advised her to deposit it in the bank where she kept an account, and he took the check from her and her bank book to have the deposit made. He did not make the deposit that afternoon. The following day was Good Friday, and the bank was closed so that he could not deposit it on that day. On Saturday he deposited it and on Monday morning it was paid. On Friday Hampton Elliott died. He, was therefore, dead when the check was paid.

The position of Mrs. Burke is, that the succession is protected by the

1586th article of the Code, which provides that an act shall be passed before a notary public and two witnesses, of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions under the penalty of nullity ;” and also by the 1588th article of the same Code which declares that “a donation *inter vivos*, even of movable effects, will not be valid unless an act be passed of the same as is before prescribed.” And in support of her pretensions she relies upon *Succession of DePouilly*, 22 La. Ann. 97 ; *Morres v. Compton*, 12 R. 76 ; *Barriere v. Gladding*, 17 La. 144. The defendant rests her case upon the 1539th article of the Code which says that “the manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality.

If the thing given to Mrs. Risley had been a promissory note her case would be covered by the cases of *Barriere v. Gladding*, *Morres v. Compton*, *Succession of DePouilly* ; in all of which cases it was held that the donation of a promissory note must be preceded by the formalities required by article 1588 (1525) of the Code. If it had been a check drawn by Hampton Elliott, and he had died before the check was presented, and the check was a donation, the check would have been worthless, because by the demise of the donor his mandate to his agent, the bank, was revoked.

But the check in question was not of Hampton Elliott’s drawing. It was a check drawn to his order. The moment he indorsed it and handed it over to Mrs. Risley, his property in it ceased. It was not his money, which the bank paid when it paid the check. It was Britton & Kountz’s money. The bank paid under instructions from them and not under any mandate from Elliott.

A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it. Under these circumstances the judgment which condemns her to return it is erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court, as regards Mrs. Bishop, be annulled, and that as regards Mrs. Risley, it be also avoided, annulled and reversed, and that there be judgment in her favor, with costs in both courts.

LUDELING, C. J., and TALIAFERRO, J., dissented.

Ordered accordingly

City of New Orleans v. Finnerty.

CITY OF NEW ORLEANS v. FINNERTY, appellant.

(27 La. Ann. 681.)

Municipal officer — retaining salary out of moneys collected.

Defendant was a municipal officer one of whose duties was to collect dues and deposit them in the city treasury. He was entitled by law to a fixed salary which was to be paid in a specified manner. *Held*, that he was not entitled to retain the amount of his salary from the dues collected.

A PPEAL by defendant from judgment in favor of plaintiff in an action to recover a balance of collections made by defendant as an officer in the service of plaintiff. The opinion states the case.

Edward Phillips, for appellant.

B. F. Jonas and Samuel P. Blanc, for respondent.

MORGAN, J. Martin Finnerty was appointed by the proper city authorities wharfinger for the second district of the city of New Orleans. He was entitled to a salary fixed by law. He was by ordinance of the city government *ex officio* collector of levee dues, and solely responsible for the collection and payment of the same to the administrator of finance. He gave bond for the faithful performance of his duties. The city sues him for a balance of collections, made under the authority of his office, amounting to \$2,721.82. His sureties are made parties to the suit. Judgment for the same amount is asked against them *in solido*.

Finnerty claims that the city owes him \$289.29 on account of his services, expenses of his office, and the payment of employees. And this is his defense. It is admitted that he is a creditor of the city in the sum due by him.

The questions for us to determine are whether Finnerty, a salaried officer of the city, when acting in the direct line of the duties assigned to his office, collects funds due to the department of the city government to which he belongs, can pay himself the salary attached to the office, other employees of the office, and the expenses thereof, and deposit whatever may remain in his hands in the treasury? When sued for the amounts collected by him in his official capacity and in the proper performance of the duties of his office, can he plead in compensation the salary due to him, the money he has paid to employees in his office, the expenses of the office; it being admitted that the salary, the money paid to the employees and the expenses were due when paid even when they are established by judgment of a court of competent jurisdiction?

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We think the question must be answered in the negative. He accepted the office of wharfinger with all of the advantages, duties, and obligations thereof. His advantage was the salary attached thereto. His duties were to collect the moneys due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit: out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debts is the same. It cannot be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties by a debt due by the principal to the agent. No officer of a government, State or municipal, is empowered to pay himself his salary or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he cannot pay himself.

We are informed that the administrator of commerce authorized Finnerty to retain a sufficient sum out of the moneys collected by him to pay his salary and also other employees in the office and expenses of the office. The answer, we think, to this is that the administrator of commerce had no power to grant him such authority. We are next assured that the same thing has been done in other instances. The reply is that custom cannot supersede the law in such cases, and that if it is a custom it is a most vicious one, entirely unjustifiable, and which results in the payment in full of certain favorites while others, perhaps equally deserving, get only a portion of their earnings. No such result was ever contemplated by the framers of the city charter. All officers of a government, municipal as well as general, have their respective duties in their several departments to perform; all are of the same rank before the treasury, and none can be paid their salaries except in the mode pointed out by law nor one in preference to another.

Counsel for the defendant rely upon the authority of Merlin, *verbo* Compensation, part 3, No 3; Toullier, vol. 7, par. 379; Duranton, vol. 12, No. 520; Pothier, No. 589, and articles in the Justinian Code and Institutes to support the proposition that what is due by the fisc to an accounting officer is to be compensated by what the officer owes to the fisc. As for example, if a receiver of taxes has in one year paid a larger sum into

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the treasury than he was accountable for, and the following year he finds himself debtor to the fisc in a like or greater sum, the sum which is due him on the first year will be compensated by the sum which he owes, and that compensation may be opposed to the State, that is to say, to the public treasury, provided that the two debts depend upon the same exercise of the same office. Also that compensation may be opposed not only against debts due to individuals, but even against debts due to towns, corporations or communities.

But nowhere do we find any authority which sustains the proposition, that a public officer charged with the performance of a specific duty, for a fixed compensation to be paid in a manner pointed out by law, has any right to plead in compensation a sum which is in his hands simply because he has not done his duty by depositing it with the proper officer as soon as he had received it, against his salary and the salary of other officers in his department, and the expenses of the office.

We have been referred, it is true, to the case of *United States v. Macdaniel*, 7 Peters, 16; *United States v. Ripley*, id. 28; *United States v. Fillebrown*, id. 28; *United States v. Ringgold*, 8 id. 163. Macdaniel was a clerk in the navy department, upon an annual salary. He also acted as the agent for the payment of the money due to the navy pensioners, the privateer pensioners, and for the navy disbursements. He received \$280 per annum for his services in the payment of pensioners; and for ten or fifteen years he received one per cent on moneys paid by him for navy disbursements. He was sued on a balance of account arising out of these transactions. He pleaded that he was entitled to the percentage charged by him. The court decided that he had performed duties not properly belonging to his employment; that he had made, and had been paid, the same charges for ten or fifteen years, without objection; that the secretary of the treasury was authorized to employ him in that particular duty, and that he was entitled to compensation thereof.

In *Ripley's case*, he claimed to be allowed in compensation of sums alleged to be due by him, extra services rendered in the disbursements of funds in preparing plans for fortifications and for procuring and forwarding supplies of provisions, etc., to troops of the United States beyond the limits of his military command, but the court refused to sanction the charge of the district judge that his claim was well founded and reversed the judgment in his favor.

In *Fillebrown's case* the court held that the allowance of compensation by a fixed salary to the defendant, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund.

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The propriety of these decisions we do not question. We think, however, that they do not touch the defendant's case. Neither do we dispute the doctrine as stated in *Ringgold's case* that when an action is brought by the United States to recover money in the hands of a party who has a legal claim against them it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice and to turn him round to an application to Congress.

But we return to our original propositions, and repeating what we have already said, are of the opinion that no salaried officer of the city government, whose salary is to be paid in the manner pointed out by the law, can, while acting in the strict line of his duty, collect money belonging to the city and, when sued therefor, plead in compensation the salary which may be due him, and amounts paid by him to other creditors of the city.

Judgment affirmed

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

MALONE v. HATHAWAY.

(64 N. Y. 5.)

Master and servant — negligence of co-servant — liability of master.

Plaintiff's intestate was killed while in defendant's service by the fall of a mash-tub. The evidence showed that defendant superintended his business ; that he employed a competent carpenter who had charge of the repairs ; that the fall of the tub was occasioned by the decay of the timbers on which it rested owing to constant dampness ; that this decay was not apparent, but could have been easily detected by proper tests. *Held*, that defendant was not liable for plaintiff's death.

Per ALLEN, J. When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master to whom he has left every thing, then the middleman's negligence is the negligence of the employer for which the latter is liable. But when the master is an individual acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and he is present superintending the establishment in person, no such responsibility attaches in respect of the acts of a competent foreman selected by and in the employment of the master. (*See note, p. 579.*)

ACTION by the administratrix of Thomas Malone, deceased, against defendant as surviving partner of the firm of Bevier & Co. to recover damages for the death of the intestate occasioned through the alleged negligence of defendant.

The said firm of Bevier & Co. were brewers in the city of Rochester, and the said intestate was a servant in their employ at the time of his death which was caused by the falling of a mash-tub in the brewery.

The evidence tended to show that the timbers supporting the mash-tub had become rotten from the continual dampness to which they were subjected ; that such rottenness could have been detected at any time by striking or boring into the timbers ; that said timbers had been repaired or renewed about eleven months before the accident, and that no tests of their condition had been since made.

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It further appeared that the members of the said firm gave personal supervision to their business; that they had in their employ a Mr. Bagley, who was a competent carpenter, and whose duty it was to keep the brewery in repair.

The court charged, among other things, that the master might devolve the duty of providing a safe and secure building upon another competent person but he does so at the risk of that other person doing the duty, and is responsible for his neglect to perform it, and that the question in the case was: "Was Mr. Bagley, the man upon whom was devolved the business of repairing this building, guilty of a want of ordinary care and prudence in providing that the building should be kept ordinarily secure?" To this portion of the charge defendant's counsel duly excepted. The plaintiff had a verdict, and the judgment entered thereon was affirmed by the General Term. Further facts appear in the opinions.

J. O. Cochrane, for appellant. The judge erred in charging that defendant was responsible for the negligence of the carpenter. *Hofnagle v. N. Y. O. & H. R. R. Co.*, 55 N. Y. 608; *Chapman v. E. Co.*, id. 579. Skill and diligence could only be required of defendant in regard to repairs, and not in the construction of the building. *De Graff v. N. Y. O. & H. R. R. Co.*, 3 T. & C. 255; *Unger v. Forty-second St. R. R. Co.*, 51 N. Y. 497. The court erred in refusing to charge that defendant was not liable for negligence of its agents of which it had no notice. *Warner v. Erie R. Co.*, 39 N. Y. 468; *Wright v. N. Y. O. R. R. Co.*, 25 id. 562; *Laning v. N. Y. O. R. R. Co.*, 49 id. 521; 10 Am. Rep. 417; *Wilson v. Merry*, L. R., 1 Scotch App. 326, cited 39 N. Y. 326; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Frazier v. Penn. R. R. Co.*, 38 Penn. 104; *Moran v. N. Y. O. & H. R. R. Co.*, 3 T. & C. 770.

James B. Perkins, for respondent. The motion for a nonsuit was properly denied. *Marshall v. Stewart*, 33 E. L. & Eq. 1; *Ryan v. Fowler*, 24 N. Y. 410, 413; *Warner v. Erie R. Co.*, 39 id. 468, 475; *Laning v. N. Y. O. R. R. Co.*, *supra*; *Plank v. N. Y. O. & H. R. R. Co.*, 1 T. & C. 319, 323; *Flike v. B. & A. R. R. Co.*, 58 N. Y. 549; S. C., 13 Am. Rep. 545; *Coombs v. N. R. O. Co.*, 102 Mass. 572; S. C., 3 Am. Rep. 576. Defendant was liable although he had employed skillful agents. *Ryan v. Fowler*, 24 N. Y. 410; *Heffernan v. Benkard*, 1 Robt. 432; *Seabrook v. Hecker*, 2 id. 291. The fact that Malone was a co-employee does not relieve defendant from liability. *Connolly v. Poillon*, 41 Barb. 366; *afforded*, 41 N. Y. 619; *Ryan v. Fowler*, 24 id. 413; *Laning v. N. Y. O. R. R. Co.*, *supra*.

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ALLEN, J. The recovery was had in this action solely by reason of the negligence of a co-employee of the plaintiff's intestate. The issue, under the instructions to the jury, was narrowed down to the question, "whether there was negligence on the part of Bagley; an omission of that ordinary and reasonable degree of care and prudence which a man of ordinary and reasonable care and prudence will exercise in the conduct of his own affairs."

The jury were told that if there was no such negligence the defendants were entitled to a verdict. The alleged negligence, which was thus made the sole subject of inquiry, was the omission to examine and securely to repair the supports of the mash-tub which had been repaired, and in fact replaced, but eleven months before its fall, resulting in the death of the intestate. At that time it was, as was assumed on the trial without objection on the part of the plaintiff, or a request to submit any question of fact in respect thereto to the jury, well and properly constructed, and securely placed, and the beams and posts upon which it rested sound and in good condition. No personal neglect or want of care was charged upon the defendants either in examining into the condition of the supports, or in repairing them, nor was it claimed that they knew, or ought to have known, that repairs were necessary to the proper support of the burden resting upon them or the safety of those employed in the building. Neither were the defendants charged with any omission of duty or want of proper care in the selection of competent servants and agents to make proper and needful repairs in every part of the building, and the fixtures, or furnishing proper and suitable materials for that purpose. We concur in the opinion of Judge SMITH, in the Supreme Court, that the cause was submitted to the jury upon an erroneous issue. The rule is well settled, and is salutary as tending to induce proper care on the part of servants and employees, and as limiting the liability of masters for injuries to their servants to their own personal acts or omissions of duty, that a master is not liable to his servants for the negligence or want of care of fellow-servants who have not been negligently appointed or retained in service. *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Priestley v. Fowler*, 3 Mees. & W. 1; *Hoffnagle v. N. Y. Cent. & Hud. R. R. Co.*, 55 N. Y. 608. For one's own negligence there is no difference between liability to a stranger, or to a servant. It makes no difference in the application of the rule exempting the master from liability for injuries to his servants for the acts of co-servants, that the one receiving the injury is inferior in grade, and subject to the orders of the one by whose negligence the injury is caused, if both are engaged in the same general business, accomplishing one and

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the same general purpose. *Warner v. Erie R. Co.*, 39 N. Y. 468; *Felt-ham v. England*, L. R., 2 Q. B. 38.

It is not of any consequence that the negligent servant by whose want of care or skill harm comes to another servant in the same general employ, is charged with some special authority or duty, and that the two, the injured and the one causing the injury, are not equal in station and authority. The fact that the careless and negligent servant is placed in superintendence or authority over the others does not constitute an exception to the general rule. *Wilson v. Merry*, L. R., 1 Scotch and D.v. App. 326.

An exception has been engrafted upon the rule, and in the application of that exception the learned judge at the trial fell into the error suggested. When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master, to whom the employer has left every thing, then the middleman's negligence is the negligence of the employer for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. Rep. 369; *Murphy v. Smith*, 19 C. B. (N. S.) 361. When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants in employing and selecting such servants and in the general conduct of the business committed to his care. This is the extent and effect of the decision in *Laning v. N. Y. O. R. R. Co.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417, which I think has been greatly misapprehended. It was not intended in that case to disturb the general rule of law, limiting the liability of masters to their servants for injuries received while in their service, or to enunciate any new proposition. A proposition there very much pressed upon the court was, that a corporation has discharged its whole duty to its servants of a lower rank, when it has employed skillful and competent general agents and superintendents; and that the negligence of such agents or superintendents is not the negligence of the corporation, nor is it liable therefor. Much of the opinion is given to a consideration of that proposition, and general remarks made in refutation of it have been applied to other circumstances and erroneous deductions made. The defendant was held liable under the circumstances of that case for the negligent and improper retention by Colby, of an incompetent and drunken laborer, through whose

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incompetency and bad habits the plaintiff received the injury complained of, for the reason that Colby was regarded as representing the defendant corporation and performing its duty in the employment of laborers and servants, and notice to Colby of the incompetency and unfitness of Westman was regarded as notice to the defendant. The result necessarily followed the conclusion of the court, that he was the general agent and representative of the defendant, and not a mere fellow-servant with the others charged with some special duty. His omission in such case was the omission of the principal, and his failure to furnish suitable and competent laborers, and proper materials and implements for the work was attributable to the corporation of which he was the general agent in that department. Such an agency must not be confounded with the position of a mere foreman, one charged with special duties, but performing them under general or special instructions from the principal who retains and has the general supervision of the business and to whom, and whose immediate direction, all are subject. *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; S. C., 13 Am. Rep. 545, was decided upon the same general principle, that the "head conductor," whose duty it was to make up the morning trains and employ and station the brakemen, was *pro hac vice* the general agent and representative of the corporation for whose acts and neglects the latter was responsible, and that his neglect to furnish brakemen, sufficient in number and capacity for the service, was the neglect of the defendant to perform a duty which the law cast upon it. The dissents in that case, as well as that in *Laning's case*, were not to the principle, but to the application of it to the facts and circumstances of those cases, and the position of the employees for whose faults the employer was charged. Those cases are not subject to criticism. The law was well adjudged as all the members of the court agreed; the only dissent in opinion was as to the relation and position occupied by the servants whose acts were under discussion. Bagley's situation was that of foreman merely, having no general charge, except such as is common to those acting in that capacity. The defendants were present and had the general charge of and responsibility for the different branches of the business carried on by them. If it was claimed that Bagley's position and responsibilities were different from that named as foreman, and that the defendants had transferred the charge and direction of any branch of the business and of their duties upon him, it would have been a proper question for the jury, if, indeed, there was any evidence to warrant the claim.

In *Wilson v. Merry*, *supra*, the injury was caused by the negligence of the general manager of the works of the defendants at the coal pit,

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and the defendants having selected proper and competent persons to superintend and direct the work, and furnished them with adequate materials and resources, were not liable to the co-employees of the general manager or foreman, for injuries received through his carelessness or want of skill. The unskillful and improper erection of a scaffold by the foreman or manager, as a means for the prosecution of the work of those employed, destroyed the ventilation of the mine which was sufficient before, and caused an explosion of fire-damp, resulting in the death of the plaintiff's son. The same principle is illustrated and applied in *Feltham v. England*, L. R., 2 Q. B. 33; *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Gallagher v. Piper*, 19 id. 669, 692; *Warner v. Erie R. Co.*, 39 N. Y. 468. Corporations necessarily acting by and through agents, those having the superintendence of various departments with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representative of the corporation charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limits of the delegated authority the acting principal. These acts are in such case the acts of the corporation for which, and for whose neglect, the corporation within adjudged cases must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. *Wright v. N. Y. C. R. R. Co.*, *supra*; *Frazier v. Penn. R. Co.*, 38 Penn. St. 104; *Laning v. N. Y. C. R. R. Co.*, and *Filke v. B. & A. R. R. Co.*, *supra*; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; S. C., 3 Am. Rep. 506; *Ford v. Fitchburg C. Co.*, 110 Mass. 240; S. C., 14 Am. Rep. 598. A person thus placed by a corporation, in such a position of trust and authority, may be fairly considered as its representative *pro hac vice*. But when the principal is an individual acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and is present himself superintending the establishment in person, no such presumption arises, or responsibility attaches in respect of the acts of a competent and proper foreman, selected by and in the employment of the principal.

There was no warrant for holding, as matter of law, the defendants in this case liable to the plaintiff's intestate for the neglect and want of care of Bagley, the foreman of the carpenters employed in the brewery.

The judgment must be reversed, and a new trial granted.

CHURCH, C. J. (dissenting). The material question involved in this

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action as to liability of the principal for injuries arising from the negligence of employees, has been frequently before the court, and in respect to which, as will be seen by reference to the cases, there is some difference of opinion among members of the court. The principle upon which the verdict in this case was obtained has been, in my opinion, adjudicated in several cases in this court. The duty of maintaining the building in a secure and safe condition, at all times, for workmen employed in the building, was a duty devolving upon the principal. He was bound to exercise proper care to prevent the accident which occurred, and when he delegated that duty to Bagley, the latter represented the principal, and the principal is responsible for his acts and omissions in respect to such duty. Although disclaimed by my brethren, I cannot but think that the reversal of the judgment will be deemed at variance with the rule heretofore adopted by this court in *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521, and *Flike v. B. & A. R. R. Co.*, 53 id. 549, and *Corcoran v. Holbrook*, 59 id. 517.

All concur with ALLEN, J., except CHURCH, C. J., and RAPALLO, J., dissenting.

Judgment reversed.

NOTE.—The real question involved in this case was, whether the duty of the master to keep the premises in which his servants are employed, in a safe condition, is absolute, or whether he is simply bound to exercise due care to that end. The question has often been decided, in one form and another, and we are aware of no recognized authority that differs essentially from the doctrine of the principal case. Mr. Wood in his "Law of Master and Servant," p. 696, says: "The master owes the same duty in this respect to the servant that he owes to a stranger lawfully upon the premises, and in either case, it is a question of care and diligence on the master's part, and of a want of proper care and diligence on the part of the person injured," and he cites numerous cases to show that the master is simply bound to exercise due care in this respect. *Stack v. Paterson*, 6 Phila. (Penn.) 225; *Hackett v. Middlesex Mfg. Co.*, 101 Mass. 101; *Paterson v. Wallace*, 1 Macq. (Sc.) App. Cas. 748; *Ryan v. Fowler*, 24 N. Y. 410; *Tinney v. Boston & Albany R. R. Co.*, 62 Barb. (N. Y.) 218; *Weems v. Mathieson*, 4 Macq. (Sc.) 215; *Feltham v. England*, L. R., 2 Q. B. 33; *Potts v. Plunkett*, 9 Ir. C. L. (Q. B.) 290; *Warner v. R. R. Co.*, 39 N. Y. 468; *Malone v. Hawley*, 46 Cal. 409; *Northcoate v. Bachelder*, 11 Mass. 322; *Roberts v. Smith*, 2 H. & N. 213; *Cooper v. Hamilton Mfg. Co.*, 14 Allen (Mass.), 193; *Marshall v. Stewart*, 33 Eng. L. & Eq. 1; *Seymour v. Maddox*, 16 Ad. & El. (Q. B.) 326; *Brown v. Accrington Spinning Co.*, 3 H. & C. 511.

The question is, *whether he knew, or ought to have known of the defect.*

SMITH, J., in *Ryan v. Fowler*, *supra*; *Paterson v. Wallace*, *supra*; *Perry v. Marsh*, 25 Ala. 659; *Stack v. Paterson*, *supra*; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; S. C., 3 Am. Rep. 143; *Swords v. Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 295.

This being the case the duty is not absolute, and the master has not contracted to discharge it in person, and may commit its discharge to a middleman, and is only bound to exercise reasonable care in the selection of such person. *Allen v. New Gas Co.*, *post*; *Wilson v. Merry*, L. R., 1 Sc. App. 326; *Hand v. Vt. & Canada R. R. Co.*, 32 Vt. 473; *Howells v. Landore, etc., Steel Co.*, L. R., 10 Q. B. 62. And as to what is reasonable

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cause is essentially a question for the jury. *Arkerson v. Dennison*, 117 Mass. 407; *Kelley v. Norcross*, 121 id. 508; *Donaldson v. R. R. Co.*, 18 Iowa, 280.

In the principal case the duty of keeping the building in proper and suitable repair was committed to a competent carpenter, and the court held, in conformity with an almost unbroken line of authorities, that under these circumstances there could be no recovery. The master is not bound personally to inspect the premises or the instrumentalities of the business. His duty is discharged when he commits the duty to a competent person, or rather when he exercises due care in selecting a competent person to discharge it for him. Upon this point Mr. Wood's "Law of Master and Servant," p. 903, commenting upon the duty of the master as to the instrumentalities of the business, says: "It might be gross negligence for the master to discharge these duties in person, particularly when he had no knowledge of machinery or its use, and no knowledge or experience requisite to enable him to judge of its suitability or safety," and he proceeds to illustrate by numerous cases the application of the doctrine. Particularly as a case in point he cites *Stark v. McLaren*, 10 C. S. (Sc.), 3d Series, 31, and *Northcoate v. Batchelder*, *supra*. As to the liability of the master for the acts of a middleman, the rule seems to be as stated by Mr. Wood: "Whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which vests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman, whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman, he stands in the place and stead of the master, but as to all other matters he is a mere co-servant, and the question is not whether the master has reserved any oversight or discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties, to the servant injured," thus giving to the middleman a dual character, to wit: that of master and that of co-servant. This being the rule, and we believe that the cases cited by the author warrant it, the test of liability is always easy. That is, to ascertain whether the duty committed to the middleman is one that rests upon the master as an absolute duty. *Allen v. New Gas Co.*, L. R., 1 Ex. D. 251; *Grizzle v. Frost*, 3 F. & F. 622; *Munn v. Oriental Print Works*, 11 R. L. 187; *Brickner v. R. R. Co.*, 2 Lans. (N. Y.) 506; affirmed, 46 N. Y. 672; *Mullan v. Steamship Co.*, *ante*, p. 2, *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Siegel v. Schantz*, 2 T. & C. (N. Y.) 353; *Wright v. N. Y. Central R. R. Co.*, 28 Barb. (N. Y.) 80; *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. Rep. 369; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 551; S. C., 13 Am. Rep. 545; *Lanning v. R. R. Co.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417; *Brothers v. Carter*, 52 Mo. 373; S. C., 14 Am. Rep. 424; *Brabbitts v. R. R. Co.*, 38 Wis. 289; *Wilson v. Merry*, *supra*; *Warner v. R. R. Co.*, *supra*; *Faulkner v. R. R. Co.*, 49 Barb. 324; *Hand v. R. R. Co.*, *supra*; *Tarlant v. Webb*, 18 C. B. 797; *Chapman v. R. R. Co.*, 55 N. Y. 579; *Wright v. N. Y. C. R. R. Co.*, 25 id. 562; *Kelley v. Norcross*, 121 Mass. 508; *Coombs v. New Bedford Cordage Co.*, 102 id. 572; *Ford v. Fitchburg R. R. Co.*, 110 id. 240.

The question is not, whether the middleman was in fact negligent, but whether the master was negligent in employing him, or was bound at his peril to discharge the duty to the servant. *Arkerson v. Dennison*, 117 Mass. 407; *Wilson v. Merry*, *supra*; *Lanning v. R. R. Co.*, *supra*; *Chapman v. R. R. Co.*, *supra*. Because a vacancy can only be had upon the ground of some negligence imputable to the master. *Flynn v. Beebe*, 98 Mass. 575; *Noyes v. Smith*, 28 Vt. 559; *Wright v. N. Y. C. R. R. Co.*, *supra*; *Warner v. R. R. Co.*, *supra*; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Hand v. Vt. & Canada R. R. Co.*, *supra*; *Potts v. Plunkett*, *supra*; *Tarrant v. Webb*, *supra*; *Paterson v. Wallace*, *supra*; *Lanning v. R. R. Co.*, *supra*; *Webb v. Rennie*, 4 F. & F. 608; *Ballney v. Croes*, 11 C. S. (Sc.), 3d Series, 626. And the burden is upon the plaintiff to establish negligence, or personal fault on the master's part and his own care. *Ormondas v. Holland*, El. Bl. & El. 102; *Donaldson v. M. & M. R. R. Co.*, 18 Iowa, 281; *Rusch v. City of Davenport*, 6 id. 443; *Mellors v. Shaw*, 1 B. & S. 437; *Perry v. Marsh*, 25 Ala. 659; *Mad. R. R. Co. v. Barber*, 5 Ohio St. 541; *Assop v. Yates*, 2 H. & N. 768; *McMellan v. R. R. Co.*, 28

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Barb. (N. Y.) 449; Wood's "Law of Master and Servant," p. 754, n. 3. And the presumption is that the master discharged his duty, and this presumption must be fairly overcome by proof of his personal fault or negligence. *Brothers v. Carter*, *supra*; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; S. C., 4 Am. Rep. 364.

There are cases seemingly opposed to the doctrine of the principal case, as *Ford v. Fitchburg R. R. Co.*, *supra*, in which it was held that the master was liable for the negligence of a master mechanic in not repairing an engine, which he was notified needed repairs, and in consequence of the defects in which the plaintiff was injured. But that case differs essentially from the principal case, in that, in the Massachusetts case the master mechanic had the entire charge of the department in which the plaintiff was employed, hired and discharged the men, and directed what engines they should use, and in the exercise of such authority, directed the plaintiff to use the defective machine after he knew of the defects therein. That the court did not intend to hold that the master may not, in the exercise of due care in their selection, commit the discharge of precisely such duties as the carpenter, in the principal case, was intrusted with, to a middleman without being liable for his negligence in their discharge, is evident from the case of *Kelly v. Norcross*, 121 Mass. 508, in which the rule as stated by Mr. Wood, as cited by us, *supra*, is substantially sustained. In that case it was sought to recover damages for injuries sustained by the plaintiff's intestate, by reason of the fall of a defective staging, while in the defendant's employ. "The servant," said DEVENS, J., "is not required to take the risk of the carelessness of those who undertake to discharge under the master's direction the master's duty toward him, even if they are also servants of the same master. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Ford v. Fitchburg R. R. Co.*, *supra*. Where, however, the master does not undertake the duty of furnishing or adopting the appliances by which the work is to be performed, but this duty is intrusted to, or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished, and suitable workmen are employed by him, even if they negligently do that which they thus undertake to do." The same doctrine has been held in numerous cases. *Warner v. Erie R. R. Co.*, *supra*; *Faulkner v. Erie R. R. Co.*, *supra*; *Wilson v. Merry*, *supra*; *Allen v. New Gas Co.*, L. R., 1 Ex. D. 251; *Howell v. The Landore Siemens Steel Co.*, L. R., 10 Q. B. 62; *Chapman v. Erie R. R. Co.*, 55 N. Y. 579.

The act of co-service is "subjection to the same general control, coupled with an engagement in the same common pursuit." All who are engaged in the common service, from the highest to the lowest, and who are subject to the same general control, are fellow-servants within the rule. *Farwell v. Boston, etc., R. R. Co.*, 4 Metc. (Mass.) 49; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Manville v. Cleveland, etc., R. R. Co.*, 11 Ohio St. 417; *Tunney v. Midland R. R. Co.*, L. R., 1 C. P. 291.

"Superiority in grade or rank does not change the relation." Wood's "Law of Master and Servant," p. 847 *et seq.*; *Sherman v. R. R. Co.*, 17 N. Y. 153.

A foreman is a fellow-servant with those employed under him (*Gallagher v. Piper*, 16 C. B. [N. S.] 669; *Flitham v. England*, *supra*; *Gallagher v. Piper*, *supra*; *Searle v. Lindley*, *supra*); a general manager (*Searle v. Lindsay*, 11 C. B. [N. S.] 429), or a superintendent. *Albro v. Agawam Canal Co.* As to all matters except those, where they stand in the place of the master to discharge his duties to the servant, that are absolute, or which he has impliedly contracted to discharge in person. *Allen v. New Gas Co.*, *supra*; *Brickner v. R. R. Co.*, *supra*.

A middleman is bound to exercise the same degree of care in the selection and retention of co-servants, as the master is, and the master is bound by his laches in this respect. *Walker v. Bolling*, 22 Ala. 294. Especially—*Gibbs v. Crombie*, 2 C. S. (Sc.), 4th Series, 886; *Laning v. R. R. Co.*, *supra*; *Wright v. N. Y. C. R. R. Co.*, 28 Barb. (N. Y.) 80 (This latter case was reversed by Court of Appeals, 25 N. Y. 555, but its doctrine has been frequently referred and assented to by that court since. See Wood's "Law of Master

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and Servant," p. 880.) So in reference to instructing young and unexperienced servants in regard to the danger of the employment and in not employing them in dangerous branches of the business. *Mann v. Oriental Print Works, supra*; *Grizzle v. Frost, supra*; *Coombs v. New Bedford Cordage Co., supra*; *Siegel v. Schantz, supra*; *R. R. Co. v. Fort*, 17 Wall. (N. S.) 554; *Walsh v. Peet Valve Co.*, 110 Mass. 23. And in Pennsylvania it has been held that the master is liable for the middleman's negligence in neglecting the instrumentalities of the business, if the master yields entire control to him in that respect. *Mullan v. Steamship Co., ante*, p. 2. And in Massachusetts in the repair of the same, when he has notice of the defects therein, and he has entire control over that branch of the business. *Ford v. Fitchburg R. R. Co., supra*. And generally it may be said that the master is liable for any abuse of the middleman, of the authority committed to him, as, by directing an inexperienced or youthful servant to perform a dangerous service. *Grizzle v. Frost, supra*; *R. R. Co. v. Fort, supra*; *Siegel v. Schantz, supra*. Or in exposing any servant under his control to dangers not incident to or contemplated in the contract of service. *Mann v. Oriental Print Works, ante*; *Waller v. S. C. Railway Co.*, 2 H. & C. 102; *Washburn v. R. R. Co.*, 8 Head (Tenn.), 638; *Murphy v. Smith*, 19 C. B. (N. S.) 362.—*REP.*

BARLOW v. MYERS, appellant.

(64 N. Y. 41.)

Action — on an agreement to pay the debt of another — set-off.

Defendant, for a valid consideration, assumed and promised to pay the debts of R., which included three promissory notes held by N. Afterward, and before maturity, N. duly transferred these notes to plaintiff. *Held*, in an action on the notes, that defendant could set off a claim held against N.

The promise of A. to pay the debts of B. is a promise to pay the creditors of B. who are such at the time the promise is made, and any subsequent assignee of a then existing claim against B. takes it subject to the equities between A. and B.

ACTION by plaintiff as holder of three promissory notes made by the firm of Randall & Williams upon a promise made by the defendant to said firm upon assignment to her of the property and assets of the firm, and as part consideration for the assignment to pay the debts of the firm.

The three promissory notes, at the time of the sale and agreement, were held by Nathan Randall, and were not then due. Randall transferred them before maturity to plaintiffs. Defendant at the time held a note against Randall. This she set up in her answer and offered to prove as a set-off, but the referee rejected the evidence, and upon his report a judgment for the plaintiffs was entered, and defendant appealed.

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D. Pratt, for appellant. Plaintiffs could not maintain this action on the contract. 47 N. Y. 233, 242; Add. on Cont. 940; 2 R. S. 191; *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, id. 446; *Etna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; *Kelly v. Roberts*, 40 id. 432; *Merrill v. Green*, 55 id. 270. The contract was only made with those who were creditors of the firm at the time of making it. *Watson v. McLaren*, 19 Wend. 557; *McLaren v. Watson*, 26 id. 425; *Lamourieux v. Hewitt*, 5 id. 307; *Miller v. Gaston*, 2 Hill, 188; *Brown v. Curtis*, 2 Com. 225. The note held by defendant against Randall was a proper subject of set-off 2 R. S. 354; Code, § 111. The rule that partnership property is primarily liable for the partnership debts is not applicable here. 6 Ves. 119; 32 N. Y. 65; 52 id. 146, 159; *Manhat. Co. v. Reynolds*, 2 Hill, 140; *Cruger v. Armstrong*, 3 Johns. Cas. 528.

Jos. Larocque, for respondents. An action lies upon a promise made for a valid consideration to a third person for the plaintiff's benefit, although the latter was not privy to the consideration. *Schermerhorn v. Vanderheyden*, 1 Johns. 140; *Cleveland v. Farley*, 9 Cow. 639; *Barker v. Bucklin*, 2 Den. 45; *D. & H. C. Co. v. West Bk.*, 4 id. 97; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Ricard v. Sanderson*, 41 id. 179; *Freeman v. Auld*, 44 id. 55; *Hutchings v. Miner*, 46 id. 456, 469; *Garnsey v. Rogers*, 47 id. 233; *Cooley v. Howe M. Co.*, 53 id. 620; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Olaflin v. Ostrom*, 54 id. 581. The contract, though made by defendant nominally as executrix, was in the eye of the law her own personal contract. *Austin v. Munro*, 47 N. Y. 368; *Ferrin v. Myrick*, 41 id. 315; *Reynolds v. Reynolds*, 8 Wend. 244; *Dermott v. Field*, 7 Cow. 58; *Myer v. Cole*, 12 Johns. 349. The note against Randall was not a proper set-off. *Merritt v. Seaman*, 2 Seld. 168; *Dale v. Cook*, 4 Johns. Ch. 13; *Shipman v. Thompson*, Willes, 103; *Tegetmeyer v. Lumley*, id. 264, note; *Duncan v. Lyon*, 8 Johns. Ch. 359; *Root v. Taylor*, 20 Johns. 137.

ANDREWS, J. The construction of the contract between Randall & Williams and the defendant most favorable to the plaintiffs, is to regard it as an undertaking by the defendant in consideration of an absolute and irrevocable sale to her of the property and assets of Randall & Williams, to pay as part of the purchase-price the debts owing by the firm, including the notes then held by Nathan Randall.

It is claimed by the defendant that the reservation to Randall & Williams of the right to repurchase the property and business, and the limitation of the defendant's undertaking, to the payment of debts to the

amount of \$22,000, indicates that the contract was intended as a special agreement between the parties who executed it, and that the defendant did not intend to enter into any contract obligation with or for the benefit primarily of the creditors of the firm. In the view we take of the case we deem it unnecessary to consider this position, but shall regard the promise of the defendant to pay the debts of Randall & Williams as absolute and as disconnected with any right in the vendors of repurchase or redemption.

In *Lawrence v. Fox*, 20 N. Y. 268, the principle was asserted and maintained by the decision of the court that an action lies upon a promise made for a valid consideration to a third person for the plaintiff's benefit, although the plaintiff was not privy to the consideration, and was not named as promisee, and was not cognizant of the promise when made. The decision was made by a divided court; but in *Burr v. Beers*, 24 id. 178, the court unanimously reaffirmed the doctrine of *Lawrence v. Fox*, without discussion, on the ground of *stare decisis*, and it must be regarded as the settled law of the State. Subsequent cases which were claimed to fall within the case of *Lawrence v. Fox*, have been distinguished from it, and while the courts have been disinclined to extend the doctrine of that case it has not been overruled, and it remains as the rule of decision in cases within the principle there decided. *Ricard v. Sanderson*, 41 N. Y. 179; *Freeman v. Auld*, 44 id. 55; *Hutchings v. Miner*, 46 id. 456; *Garnsey v. Rogers*, 47 id. 238; *The Aetna Nat. Bank v. The Fourth Nat. Bank*, 46 id. 82.

In this case the promise upon which the action is brought was generally to pay the debts of Randall & Williams, without specification of the particular debts, or naming the creditors of the firm, and in this respect it differs from all the cases to which our attention has been called where, in the absence of any trust, an action of this character by a creditor, or the person for whose benefit the promise was made has been maintained. But, assuming that this circumstance does not prevent the application to this case of the principle of *Lawrence v. Fox*, the question remains, for whose benefit was the promise made, and who are the persons other than the firm of Randall & Williams who are to be regarded as the promisees. The firm were the only promisees named in the contract, but the theory upon which third persons are allowed to maintain an action on such a promise is, as I understand, that the promise in legal effect is a promise to pay to the creditors, who are such at the time the promise is made, the debts owing to them by the person from whom the consideration moves. The debtor's obligation is to them alone, and they acquire through the promise additional

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security for the payment of their debts. This security will pass on an assignment of the debt to the assignee as an incident, and he may enforce it. *Jackson v. Blodget*, 5 Cow. 202; *Pattison v. Hull*, 9 id. 747; *Langdon v. Buel*, 9 Wend. 80; *Craig v. Parkis*, 40 N. Y. 181. But the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment of the debt between him and the promisor.

The plaintiffs were not creditors of Randall & Williams, when the contract between that firm and the defendant was made. The notes of Randall & Williams, now held by them, then belonged to Nathan Randall. He acquired, upon the execution of the contract between Randall & Williams and the defendant, an interest in the contract, and was entitled to enforce it for his security. He could not, perhaps, have brought an action upon it until the note had matured, but the right in him to the security in the nature of a guaranty was perfect as soon as the contract was made. He was the person for whose benefit, in part, the promise of the defendant was made, and not the plaintiff, who then had no interest in the notes, and no debt against Randall & Williams. It is claimed that in legal intendment the promise was to such persons as should be the holders of the notes at their maturity, but there is nothing to show that this was the intention of the parties to the contract. They could not know that the notes would be transferred, and it does not in any way appear that it was any part of the object of the transaction to give them additional currency or credit.

The contract, if construed as claimed by the plaintiffs, would constitute the defendant the immediate promisor, not only of Nathan Randall, but of all the persons through whose hands the note might pass before maturity. It is an immaterial circumstance in determining the question to whom the promise was made, that the debts of Randall & Williams were upon negotiable instruments. A guaranty of a note or bill contained in the separate instrument is not negotiable because the paper guaranteed has that quality. *Watson v. McLaren*, 19 Wend. 557; S. C., 26 id. 425. So if a mortgage should be given to secure negotiable paper, the mortgage would not be negotiable, although it would pass to the indorsee of the paper as incident to the debt, and a transfer by a party to whom a personal covenant is made, of his interest therein, does not make the person receiving it the covenantee.

The negotiability of promissory notes and bills of exchange is an exception in the general law of contracts, and the right of a transferee for value before maturity of choses in action to hold them freed from the

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equities existing against them in the hands of a prior holder attaches only to negotiable instruments.

It would be a great extension of the doctrine of *Lawrence v. Fox*, to hold that a promise to a debtor to pay his debt was a direct undertaking of the promisor with each of the persons successively who should acquire the interest of the original creditor, and this construction is not justified when there are no special words indicating that intention. The plaintiffs, therefore, as to the promise upon which the action is brought, stand in the place of Nathan Randall, and in the position of his assignees.

Before the Code, the action could only have been brought in his name, and the right of set-off would attach in favor of the defendant in respect of any debt or claim against him held by her at the time of the commencement of the action, which within the statute was the subject of set-off. 2 R. S. 354, § 17. The action under the Code was properly brought in the name of the plaintiffs, but the right of set-off as it before existed is not affected by the change in the form of the action. Code, §§ 111, 112. The note of Nathan Randall, held by the defendant when the action was commenced, was a proper set-off, unless she held it as executrix, and not in her own right. The defendant offered the note, with the indorsement of the payee, in evidence, as a set-off or counterclaim. The referee refused to receive the note in evidence, on a construction of the contract in question which precluded any set-off of a claim in her favor against Nathan Randall. The production of the note was *prima facie* evidence of her title to it, and if the question had been raised that she held it as executor only, she might have given further evidence on the subject. That point cannot now be taken.

The judgment of the General Term should be reversed and a new trial granted.

All concur, except RAPALLO, J., not voting.

Judgment reversed.

WEISMER, appellant, v. THE VILLAGE OF DOUGLAS.

(64 N. Y. 91.)

Constitutional law — municipal taxation for private purposes.

A statute authorized a municipal corporation, with the consent of a majority of the owners of taxable property, to subscribe for the stock of a private corporation and so issue bonds in payment therefor. *Held*, (1) that the statute was void inasmuch as it

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attempted to authorize taxation for other than public purposes ; (2) that the fact that the corporation would tend to increase the business prosperity of the town did not render its purpose public ; and (8) that the town was not estopped from denying the validity of the bonds by the fact that it had previously voted a special tax to pay interest thereon.

A PPEAL from a judgment of the General Term of the Supreme Court in the Third Judicial Department in favor of the defendant, entered upon an order reversing a judgment of the Special Term in favor of the plaintiff and directing judgment for the defendant. Reported below, 6 T. & C. 514 ; 4 Hun, 201.

This action was brought to recover the amount of certain coupons attached to bonds issued by the defendant, an incorporated village, under the authority of Laws 1868, ch. 577, whereby the defendant was authorized to take stock not to exceed \$10,000 in the Long Eddy Hydraulic and Manufacturing Company.

The court found the following facts among others :

“ The Long Eddy Hydraulic and Manufacturing Company, since the 15th of February, 1867, has been and is a corporation aggregate, incorporated and organized under the general laws of this State, and having its place of business at the said village of Douglas, formed for the object of constructing and improving a water privilege on the Delaware river at the said village and for the purpose of manufacturing lumber, etc., thereon.

“ The said Delaware river, at the point above specified, is a public highway, largely used and navigated as such by the public in running thereon to market rafts of lumber, logs and timber, which are the principal productions of the surrounding section of country.

“ By an act of the legislature of this State, entitled ‘ An act to authorize the building of a dam across the Delaware river at the village of Douglas, Sullivan county, New York,’ passed May 9, 1867, the said Long Eddy Hydraulic and Manufacturing Company was authorized, upon compliance with certain conditions therein specified, to erect, build and maintain a dam across the said Delaware river, in the town of Fremont, Sullivan county, between the county of Sullivan, in the State of New York, and the county of Wayne, in the State of Pennsylvania, at a point to be fixed on by said company, and for that purpose, under certain restrictions therein imposed, and upon making due compensation therefor, to take and flow such lands as should be necessary or convenient to enable the said company to accomplish the object of its incorporation.

“ The objects and purposes of said company were not strictly or ex-

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clusively of a private nature, but, to some extent, partook of a public character, and were sufficiently broad and extended to include a public use, and the material growth and prosperity of the said village would have been largely increased by the accomplishment of the objects of said company, as it would have added a large tax-paying element thereto, increased the value of the adjacent property, and furnished an extensive manufactory for lumber and other raw products, and the public might have been benefited, and the convenience of public business promoted by the cleaning out the channel of said river and the construction of docking and piers on the bank of the same, which would have come within the apparent objects and purposes of said company."

The court also found that, under authority conferred by said act, the officers of defendant subscribed for stock of said company to the amount of \$10,000, and to that amount issued and signed bonds, of which the bonds in question form part. The bonds were denominated upon their face, "Internal Improvement Fund of the village of Douglas," and recited that they were authorized by the said act of 1868. The first three installments of interest were paid by defendant.

As conclusions of law the court found, among others, that the objects of said Long Eddy Hydraulic and Manufacturing Company were to such an extent public as to justify the legislature in exerting its constitutional power of taxation in its behalf; that said act of 1868 was constitutional and valid, and that plaintiff was entitled to recover.

It appeared that the first installment of interest was raised by a vote of the taxable inhabitants of the town, and paid by defendant, and that its officers once voted on the stock.

Further facts appear in the opinion.

D. D. Niles, for appellant. The issue of the bonds by defendant was an exercise of the power of taxation, and not an exertion of the right of eminent domain. *Town of Duaneburgh v. Jenkins*, 57 N. Y. 177; *People v. Mayor, etc.*, 4 id. 419; *Guilford v. Suprs. of Chenango Co.*, 3 Kern. 143; *Olcott v. Suprs.*, 16 Wall. 678. The constitutional inhibitions against depriving a person of property without due process of law and taking private property for private purposes do not apply to property or money exacted by the power of taxation. 4 N. Y. 419; 3 Kern. 143; *Howell v. City of Buffalo*, 37 N. Y. 267; *Darlington v. Mayor, etc.*, 31 id. 189, 190; *Davidson v. Mayor, etc.*, 27 How. Pr. 342; *People v. Mitchell*, 45 Barb. 208; 35 N. Y. 551; *Bk. of Rome v. Village of Rome*, 18 id. 38; *Thomas v. Leland*, 24 Wend. 65; *Dillon's*

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Munic. Corp. 686. The right of the legislature to delegate to any of the municipal divisions of the State the authority to impose taxes is co-extensive with its own power of taxation, and if the objects to which the proceeds of the tax are to be devoted are of such a character as to justify the legislature itself in promoting them by taxation, the act must be sustained. 2 Dillon's Munic. Corp. 687; *Bk. of Rome v. Vil. of Rome*, 18 N. Y. 88; *Loan Assn. v. Topeka*, 20 Wall. 655; *Clarke v. Rochester*, 13 How. Pr. 204; 24 Barb. 446; 26 N. Y. 471, note; *Bloodgood v. M. and H. R. R. Co.*, 18 Wend. 9, 31; *People v. Morrell*, 21 id. 576; *Cochran v. Van Surlay*, 20 id. 381, 382; *Butler v. Palmer*, 1 Hill, 824, 829; *Wynehamer v. People*, 13 N. Y. 378, 391; *Leggett v. Hunter*, 19 id. 445; *Darlington v. Mayor, etc.*, 31 id. 187; *Bk. of Chenango v. Brown*, 26 id. 467; *Town of Duaneburgh v. Jenkins*, 57 id. 177; *People v. Fisher*, 24 Wend. 215; *Grant v. Courter*, 24 Barb. 287; *Clarke v. Rochester*, id. 480; *People v. Draper*, 15 N. Y. 548; *Calder v. Bull*, 8 Dall. 386; *Thomas v. Leland*, 24 Wend. 65; 3 Kern. 148; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Benson v. Mayor, etc.*, 24 Barb. 254; *Howell v. City of Buffalo*, 37 N. Y. 267; *People v. Lawrence*, 41 id. 128. By proceeding under the act and accepting the benefits conferred by it, defendant has waived the right to question its constitutionality. *Houston v. Wheeler*, 52 N. Y. 641; *Sherman v. McKeon*, 38 id. 266; *Embury v. Conner*, 3 id. 511; *Baker v. Braman*, 6 Hill, 47; *Vose v. Cockcroft*, 44 N. Y. 415; *Van Hook v. Whitlock*, 26 Wend. 43; *People ex rel. v. Havemeyer*, 4 T. & C. 365; *Allegheny City v. McClurkan*, 14 Penn. St. 81. Defendant, as against a *bona fide* holder, is precluded from asserting that the act is unconstitutional. *F. and M. Bk. v. C. and D. Bk.*, 16 N. Y. 125; *Stoney v. Am. L. Ins Co.*, 11 Paige, 635; *Suprs. v. Schenck*, 5 Wall. 784; *Morford v. Farmers' Bk.*, 26 Barb. 568; *State of Indiana v. Woram*, 6 Hill, 33; *Moss v. Rossie, L. C. Co.*, 5 id. 187; 5 Am. L. Rev. 272; 2 Dillon's Munic. Corp. 855. Any fraud or irregularity in the issue of the bonds does not constitute a defense against a *bona fide* holder for value. *Bk. of Rome v. Vill. of Rome*, 18 N. Y. 88; *Grand Chute v. Winegar*, 15 Wall. 855; *Lexington v. Butler*, 14 id. 282; *Mercer Co. v. Hackett*, 1 id. 83; *Gelpcke v. Dubuque*, id. 175; *Meyers v. Muscatine*, id. 384; *People v. Mitchell*, 35 N. Y. 551; 45 Barb. 208. The fact that the date of the act was erroneously recited in the bonds was entirely immaterial. *Judd v. Waddle*, 21 N. Y. 186; *Jackson v. Clarke*, 7 Johns. 216; *Dodge v. Potter*, 18 Barb. 193; *Fuller v. Acker*, 1 Hill, 473.

FOLGER, J. The main question in this case is, whether there was

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power in the legislature to pass the act, which ostensibly gave authority to the defendant to issue and negotiate its bonds, and with the moneys realized therefrom to subscribe for and take shares of the capital stock of the manufacturing corporation. There was not, unless it is found in the power of taxation ; and in the further right to delegate that power to a municipality, to be exercised by it, in a locality, and over a portion of the people of the State. We shall look only to the power of taxation and the right to delegate it ; although one of the acts of the legislature, which is in a degree involved in this case, is said to indicate the exercise by the legislature of the power of eminent domain, or a delegation of that power. The immediate authority given by the principal act is to issue and negotiate the bonds of the defendant, for the future payment of money. The ultimate resort, the only sure and absolute resort for the means of payment, must necessarily be taxation. The act indeed contemplates dividends to be obtained by the defendant from the capital stock taken by it, but with so little reliance thereon, that it makes explicit, minute and elaborate provision, for taxation to meet the interest and principal of the bonds. The practical result of the actings of the defendant, its officers and agents, under the statute has been, that no payment of interest has been made save by moneys raised by taxation. The case shows that by that means alone will the bonds ever be paid by the defendant.

Now it is quite true, that there are opinions given in adjudications upon this general subject, which go to great length in declaring the extent of the legislative power of taxation, and which, if taken in all the scope of the sentiments uttered, seem to permit an extension of it without limit, and to deny any judicial power to fix a bound to it, or to question in any case the legislative right to exercise and delegate it. Perhaps the most noted of these in this State, and which may be taken as an example of all, is in the case of *The Town of Guilford v. Supervisors of Chenango County*, 13 N. Y. 143. It is a case very familiar to our bench and bar and some of the views expressed in it have the sanction of a great judicial name and reputation. It is there asserted that the legislature can determine what sums shall be raised by taxation, and the purposes to which the money shall be applied ; that it can recognize claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity ; and (what seems to press more upon us here) that, independent of any express constitutional restrictions, it can make appropriation of money whenever the public well being requires or will be promoted by it, and that it is the judge of what is for the public good. Other cases preceded or followed that, with more or less closeness to utterance of the same doctrine.

It is not needed that we now deny that there is no limitation whatever

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upon the legislative power to tax, considered as to the amount which shall be raised thereby, and the subjects from which it shall be raised, unless a limit is found in express constitutional restrictions. The reliance of the people against excessive taxation, unjust in the application of it to the thing taxed, must be in the character of their legislative representatives, and their remedy when that reliance fails must be found in the power to displace and change them at recurring intervals.

When, however, we come to deal with the power of taxation in reference to the purposes for which it is to be exercised, we may not admit so much. It cannot but be conceded that there is an end to it somewhere. Every mind must be able to conceive of some legislative attempt to exercise this great and extensive power, which would fail to find warrant either in our written Constitution or in any inherent governmental authority, and which the owner of property subjected to it would have a right to resist. To use the not uncommon illustration, it must be far beyond the reach of real legislative authority to take the property of A or of A and some, many, or all others, and give it to B when there is no legal, equitable, just or moral obligation to render unto B one farthing. But to tax A and the others to raise money to pay over to B is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him, unless they have the power, upon his complaint, to examine into the legislative act, and to determine whether the extreme boundary of legislative power has been reached and passed? So that the legislature is not sole, supreme and unrestrainable therein, and the courts are not debarred; but may, as a co-ordinate branch of the government, scrutinize and measure the legislative act; always keeping in mind, that the legislature is the primary authority which is to inquire, what is a proper purpose for the application of money to be raised by taxation, and the necessity of taxation, to subserve it, and that it must be quite clear that it has erred before the courts can arrest the consequences of its action.

Nor are the courts without some rule to guide them in their scrutiny. It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, State and municipal. When we come to ask, in any case, what is a public purpose, the answer is not always ready, nor easily to be found. It is to be conceded that no pinched or meager sense may be put upon the words, and that if the purpose designated by the legislature lies so near the border line as that it may be doubtful on which side of it

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it is domiciled, the courts may not set their judgment against that of the law makers. And hence it is that, though the case above cited (13 N. Y.) has been commented upon, and some of its utterances criticised (Dillon on Munic. Corp. p. 90, § 44, note 2; Cooley on Const. Lim. 880, note 1, 490, note 2; Sedgw. on Const. and Stat. Constr. *313, *314), the judgment there rendered upon the facts there exhibited has not been met with a disapproval, authoritative upon us. It has been accepted in this State as a binding adjudication, that the legislature may tax, or delegate to a political division of the State the power to tax, or may compel that division to tax, to raise money to pay a legal, equitable or moral claim, or to do that toward an individual which proper and expected sense of gratitude for public service ought to prompt, or a feeling of charity (which, in a legal sense, is, perhaps, as used here, no other than moral obligation), urge. It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole Commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous actions of others, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions.

In this spirit we will look at the legislation that is involved in this case. The authority to the defendant is to issue its bonds and exchange them for money, and with the money to pay the defendant's subscription to the capital stock of the Long Eddy Manufacturing Company. The purpose then to be achieved was to be reached through that company, and by the use of its corporate powers and the privileges conferred upon it by any special act of the legislature. Those corporate powers are expressed in the certificate of its incorporation, made and filed in pursuance of a general law. They are to construct and improve a water privilege on the Delaware river, and to manufacture lumber, "etc.," thereon. After the incorporation of it, power was given to it to build a dam across that river, with certain restrictions. It must be plain that there is nothing in the fact of this body being a corporation that brings any factor into the problem. Any individual, or partnership of individuals, with the requisite capital, could do all that this corporation proposed to do, or had corporate power or privilege to do, and with the same results to the public. If done

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by an individual or by a copartnership, the public and each member of it as a member of it only, would have just as much use and interest in it, and just as much benefit from it, as if done by the corporation. In either case it would be a private business, to be carried on for private profit, to be controlled by private rules, or even private caprice, into which the public or any member of it could not enter, the direct conveniences and benefits whereof neither the public nor any member of it could demand as of right. No member of the community could insist that he would, at any time or some time, in accordance with rules operating alike upon all, have personal use of the water privilege, or have his saw-logs made into lumber. The corporation could refuse him at any time and at all times. Indeed, they could at any time suspend the use of, or altogether abandon their constructed and improved water privilege, and the manufacture of lumber for themselves or for the public, and no one, not of their body, could compel to the contrary. It is not as a highway or as a public canal upon which any one may enter with his own vehicle or craft, nor as a public school or a public free-seated meeting-house, to which any one may go or send, nor even as a railroad upon which any one has a right to be carried. It is a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. So, too, the authority to dam the Delaware could as well have been given to an individual or a copartnership, and the results to the public are as far from being direct. The act conferring that authority does not, in its terms, indicate any public use or purpose in the building of the dam. The corporation is restricted in the building of it, so that it shall be so made as not to interfere with the running of rafts in the river, and the certificate of two judicial officers that it will not have that effect is a prerequisite to the erection of it, and the height of it is to be prescribed by them. As this is the only mention of any public use and purpose in the act, and as this is named to be guarded from interference, it is not too much to say that the inference from the act itself is, that the legislature did not look upon the enterprise as other than private, for the private benefit of the corporation which received it. It is suggested that it gives a power to flow lands of private owners along the river, and to estimate the amount of compensation to them therefore by the appraisal of commissioners; and that hence it is to be inferred that the legislature perceived a public purpose. It does give the corporation the right to purchase, receive and hold, such real estate as may be necessary and convenient for the company to accomplish the object for which it was incorporated, and as is liable to be flowed by reason of the erection of the dam.

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Here is no power to take lands from an unwilling owner, or to flow his lands. The authority given is only to purchase, and to receive and hold that which is thus got. The provision for commissioners to appraise the damages of any owner of lands flowed is for a case in which the owner does not resist the flowing, but claims for the damages resulting from the act. There is nothing in the act, to our apprehension, which would prevent the owner of lands flowed, or likely to be flowed, from restraining the continuance or commencement of the act of flowing them. It is simply an act conferring the right to purchase and hold real estate for certain purposes, and which creates a tribunal to which the owner of the lands and the corporation may submit the claim for damages arising from any flowing. There is not provision in it to compel any owner to part with his land, nor to submit to the award of the commissioners. There is no final order to be made by the Supreme Court until payment has been made of the damages awarded. Payment could not be made unless it was taken by the owner, and he was not bound to take it unless willing so to do. The operation of the act depended upon the will of each one owning lands affected. So that there is in it no exercise by the legislature of the right of eminent domain, nor any delegation thereof.

There is not to be discovered in the powers obtained by the certificate of incorporation, or by the last act mentioned, any public use or purpose, more than is found in the setting on foot of any business or industry in a community by private parties. Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate, and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed. We may well adopt the *obiter dictum* of GROVER, J., in *The People ex rel. v. Batchellor*, 58 N. Y. 128, 143; S. C., 18 Am. Rep. 480, 490: "I think it would not be claimed that a town could be compelled to become a stockholder in a banking or *manufacturing* corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted. Such legislation could only be sustained by holding the power of the legislature supreme over municipal corporations for private as well as public purposes. Upon principle and authority, I think that it is not as to the former, although it is as to the latter." Add to that that the legislature may not empower a majority to compel a minority to enter into a private business, whether the form of effecting the end be by a direct statute or through the operation of taxation.

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It is suggested that the findings of the Special Term are such as that this court may not inquire whether or not there was a public purpose. It is plain that the learned justice at Special Term was not willing to find as a fact without qualification, that the objects and purposes of the Long Eddy Manufacturing Company were public. He says they were not exclusively and strictly of a private nature, but to some extent partook of a public character, were sufficiently broad and extended to include a public use. Had he stopped with this generality the finding would have been stronger. But he explains how this general finding is reached, by the particulars which he gives. In reality the particulars are the findings of fact, and the generality is a conclusion of law from them. The conclusion is not warranted by the particulars. They are those consequential, indirect, and remote results which we have above commented upon as not that public use and purpose which warrants taxation to effect them. But there is another quite as grave reason why this finding is of no avail. The defendant duly excepted to it. An examination of the case fails to disclose the testimony which will of itself, or by any legitimate inference from it, afford ground for the finding. Such a finding is an error of law ; and what is more to the purpose in this discussion, it fails to affect an appellate court on review of the judgment.

The very able and ingenious argument presented by the learned counsel for the appellant presents a point which we think is novel ; it is this : The Constitution, Art. 1, § 9, forbids the legislature from appropriating public moneys for local and private purposes, save by a two-thirds vote ; the prohibition implies the assent of the Constitution, that the appropriation may be made with a two-thirds vote. But as an appropriation must take from the treasury, the treasury must be supplied again, and can, as a rule, be supplied only by taxation. Then (runs the argument of counsel), taxation for private purposes is, impliedly, recognized and validated by the Constitution. Should this be granted, it still remains to find the right, in or out of the written Constitution, to delegate a power to appropriate for a local or private purpose. The implication cannot be broader than the terms of the prohibition. It is the legislature only that can appropriate to a local or private purpose. And it is of public moneys only, moneys already at or before appropriation become public ; raised for public use by legitimate taxation to that end, and any deficit in them to be supplied only by legitimate taxation. The argument is not sound, and will not sustain a statute for the imposition of a tax, the money derived wherefrom is at once, upon collection, by the terms of the same statute, to be paid out for a private purpose. And it

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comes back to the same question : can the legislature impose a tax for a private purpose, or singly and directly, to replace in the treasury moneys bestowed by it upon a private purpose? We think not.

It is urged that there has been worked an estoppel, preventing the assertion by the defendant of the invalidity of these bonds. It is conceded by the appellant that where an act is beyond the scope of corporate power a municipality cannot be debarred from raising that objection by any subsequent conduct of its officers and agents. But it is contended that the inhabitants of the municipality may be estopped and bound by acts of acquiescence and approval, after knowledge of the facts, and that their acts may thus affect the corporate body of which they are the elements.

The municipality is the defendant here. The inhabitants are not parties to the suit nor to the bonds. Though the inhabitants of a place be incorporate, they are not the corporate body ; the very object of the incorporation is to form a legal body, not to be affected in its duration by a change among the constituent parts of it. If it should be granted that the inhabitants may be estopped, that cannot affect the defendant ; it is a political entity quite different and apart from the varying multitude who are from time to time the inhabitants of the territory within its corporate bounds. Their acquiescence cannot affect it. And if every one of the inhabitants of the village of Douglas who are *sui juris* at the time when the payments of interest were made upon them, had joined affirmatively in all those acts, that could not conclude the present population as a body, some of whom have, doubtless, come in since then, or come to majority since then, or in many other ways now come into the category of inhabitants.

The case of *Allegheny City v. McClurken*, 14 Penn. St. 81, does not commend itself to our judgment in all the doctrines there advanced. Perhaps it may be sustained under the particular statute there in question, or one like it. It is not an authority or a precedent for the case now in hand. The doctrine in *Thomas v. City of Richmond*, 12 Wall. 349, is more agreeable to our judgment.

The case of *The People ex rel. v. Havemeyer*, 4 T. & C. 365, it would be improper to discuss at length at present. We are not sure that it has not been appealed from. It is sufficient to say that the facts of that case are quite different from those here, and that the discussion in the opinion there delivered does not change the views we here express. Nor is the position tenable that the bonds, upon the face of them, assert that they are for a public purpose. Though they bear the words "Internal Improvement Fund," they also declare that the debt represented by

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them is authorized by a certain act of the legislature, to which reference is had by date and title. Thus is one about to take them put upon inquiry. And a reference to the session laws here would fail to show any act of that date authorizing the debt, or would inform for just what purpose and in just what manner and on what prerequisites they were to be issued.

We come to the conclusion that the bonds sued upon are without validity against the defendant.

Other questions raised by the points of the respective counsel need not be noticed.

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

ROUNDS v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, appellant.

(64 N. Y. 129.)

Master and servant — liability of master for injury occasioned by servant in reckless enforcement of orders.

Plaintiff jumped upon the baggage car of defendant's train. The baggageman ordered him off; the plaintiff replied that he could not get off because of a pile of wood beside the track. Whereupon the baggageman kicked him off and he fell against the wood, and then under the cars and was injured. Defendant's rules forbade persons riding on the baggage cars, and required baggagemen to strictly enforce the order. *Held*, that the court was correct in charging the jury that, although the plaintiff was a trespasser, if the baggageman, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, the defendant was liable; but that if he was acting willfully and maliciously toward the plaintiff outside and in excess of his duty, the defendant was not liable.

A PPEAL from a judgment of the General Term of the Supreme Court in the Third Judicial Department denying a motion for a new trial and ordering judgment on a verdict for the plaintiff. The opinion of the Supreme Court is reported in 5 T. & C. 475; and 3 Hun, 329.

The action was to recover damages for an injury to plaintiff occasioned by defendant's servant.

The transaction resulting in the injury occurred at Norwich, May 8 1872. The defendant operated a broad-gauge railroad from Bing-

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hamton to Norwich, and a narrow gauge railroad from Norwich to Utica. The passenger train from Binghamton on this occasion as usual ran to the depot at Norwich and transferred the passengers and freight to the Utica train and then backed south on a switch, a distance of about sixty rods to the round-house to make up the new train which was to run back to Binghamton. While the train was unloading and transferring the passengers at the depot the plaintiff, a boy twelve years old, living near the depot, got on the platform of the baggage and smoking car, at the rear end, to ride down to the round-house. A quantity of wood was piled at one point along near the west side of the track for a distance of over 100 feet. While the train was backing down the track, and when it arrived at the wood-pile, the baggageman in charge of the train discovered the plaintiff on the platform and ordered him off. According to the plaintiff's testimony, he replied: "I can't, the wood is right here; I want you to help me," and thereupon the baggageman kicked him off. He fell against the wood and rolled under the car, the wheel of which passed over and crushed his leg. A printed notice was posted up in the baggage car, and another one near where the plaintiff was standing on the platform, as follows: "No person will be allowed to ride on this baggage car except the regular trainmen employed thereon. Conductor and baggageman must see this order strictly enforced." Another printed notice was contained in the posted time-card as follows: "Train baggagemen must not permit any person to ride in the baggage car, except the conductor and news agent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule."

At the close of the plaintiff's evidence the defendant's counsel moved for a nonsuit on the grounds: 1. The plaintiff was a trespasser, or wrongfully on the cars of the defendant, and is not entitled to recover 2. The plaintiff, by his own negligence, contributed to the accident. 3. Upon the evidence the defendant was not guilty of any negligence or wrongful act in reference to the plaintiff; that the acts of Gow (baggageman), which caused the injury, were not authorized by the defendant but were a willful and wanton assault by Gow upon the plaintiff, and for these acts and their consequences the defendant is not responsible to the plaintiff. The court denied the motion and ruled that it was a question for the jury whether the baggageman was there acting within the authority of the company in putting the boy off, and whether he acted wilfully and wrongfully; to which the defendant excepted. After the defendant had given evidence contradicting the plaintiff's testimony, and at the close of the case, the defendant's counsel renewed his motion for

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a nonsuit on the same grounds, and also on the ground that no right of action is made against the defendant and that the evidence does not warrant a submission of any question of fact to the jury which could authorize a recovery. The motion was denied and the defendant excepted. The court then submitted the following questions to the jury, to which the defendant also excepted: 1. Did Gow put the boy off the cars? 2. Was he acting within the authority given him by the defendant? 3. Was he acting maliciously and in excess of his authority?

The court then charged the jury, among other things, that the plaintiff was a trespasser on the car, but if the baggageman, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner and at a dangerous place the defendant was liable; to which the defendant excepted. The court also charged the jury that if the baggageman pushed the boy off the train, and in doing so was acting as the employee of the defendant in good faith in the discharge of a duty he owed the company, the defendant would be liable for the careless and negligent discharge of his duty; but if he was acting willfully and maliciously toward the plaintiff, outside of, and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which the defendant excepted and requested the court to modify the charge or to charge that defendant was not liable if the baggageman acted willfully and wantonly without authority from defendant. This the court refused.

Francis Kernan, for appellant. Plaintiff was wrongfully on defendant's car and it was not liable for any injury sustained through the carelessness or neglect of its servants. *Robertson v. N. Y. and E. R. R. Co.*, 22 Barb. 91; *Terry v. N. Y. and E. R. R. Co.*, id. 574; *Eaton v. D., L. and W. R. R. Co.*, 57 N. Y. 382; S. C., 15 Am. Rep. 513. The act of the baggageman was an unauthorized, wanton and willful trespass upon plaintiff for which defendant was not liable. *Wright v. Wilcox*, 19 Wend. 343; *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122, 125-129; S. C., 7 Am. Rep. 418; *Hughes v. N. Y. and N. H. R. R. Co.*, 4 J. & S. 222, 225-227; *Mali v. Lord*, 89 N. Y., 381; 47 id. 127; *Vanderbilt v. R. T. Co.*, 2 Comst. 479-482.

E. H. Prindle, for respondent.

ANDREWS, J. There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master

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for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In *Higgins v. The Waterliet Turnpike Company*, 46 N. Y. 23; S. C., 7 Am. Rep. 298, this subject was considered by this court, and the rule was declared to be, that the master was responsible *civiliter* for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force toward or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes

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beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the willful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

The case of *McManus v. Crickett*, 1 East, 106, turned upon the form of the action and the distinction between trespass and case, but Lord KENYON, in pronouncing the judgment of the court, said: "Where a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in *Wright v. Wilcox*, 19 Wend. 343, and the matter was held not to be responsible where the servant, in driving his master's wagon along the highway, willfully whipped up his horses while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, ran over and injured. The servant was cautioned by a bystander that if he did not stop he would kill the boy. The court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a willful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said COWEN, J., "holds such a willful act a departure from the master's business." So in *Vanderbilt v. The Richmond Turnpike Company*, 2 Comst. 579, the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the court held that this was a willful trespass of the master for which the defendant was not liable. In *Lyons v. Martin*, 8 Ad. & El. 512, it was held that where a servant merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In *Mali v. Lord*, 39 N. Y. 381, the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant if he had been present, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what the master could not have done himself. See, also, *Bolingbroke v. The Local Board, etc.*, L. R., 9 C. P. 575. It is quite use

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less to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious and wicked purposes, does any injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is willful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was sufficient to exempt the defendant from liability that the act of the brakeman in putting the plaintiff off the car was willful. He had already charged that if the brakeman acted "willfully and maliciously toward the plaintiff, outside of and in excess of his duty," in putting him off of the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the brakeman acted willfully, although without malice, the point was not well taken. That the brakeman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a willful act which will exempt a master from liability for the tort of his servant must be done outside of his duty and his master's business. The

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charge was, therefore, strictly correct, and the exception was not well taken.

Neither was the defendant entitled to have the court rule, as matter of law that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The brakeman, in kicking the boy from the platform, acted violently and unreasonably, and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the brakeman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was willful within the rule we have stated. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must, ordinarily, be left to the jury to determine this issue upon a consideration of all the facts and circumstances proved. See *Jackson v. The Second Ave. R. R. Co.*, 47 N. Y. 274; S. C., 7 Am. Rep. 448. There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defense. The lad did not forfeit his life, nor subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb. *Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y. 843; *Lovett v. Salem, etc., R. R. Co.*, 9 Allen, 557; *Holmes v. Wakefield*, 12 id. 580.

No error of law was committed on the trial, and the judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

LANCEY, appellant, v. CLARK.

(64 N. Y. 209.)

Negotiable instrument — accommodation note — title.

Defendant made a note for the accommodation of a firm who procured its discount at a bank. A partner in the firm borrowed money from plaintiff to take up the note and after it was due took it up and sent it to plaintiff. *Held*, that plaintiff took title to the note from the partner and not from the bank and could not recover against defendant thereon.

A PPEAL from an order of the General Term granting a new trial. The action was upon a promissory note made by defendant. The facts sufficiently appear in the opinion. The case was tried before a referee who gave judgment for plaintiff which was set aside by the General Term.

Thomas H. Hubbard, for appellant.

C. F. Brown, for respondent.

EARL, J. The defendant made the note in suit for the benefit and accommodation of the firm of Lambert & Lincoln. It was discounted and the proceeds passed to their credit by the North River Bank. Each member was therefore bound, as to the maker, to pay the note, and thus save him from liability on account thereof. Before the note became due the firm was dissolved, and Lincoln was to close up its business. Plaintiff lived in Canada, and Lincoln wrote him, requesting him to take up the note and furnish the money for that purpose. Plaintiff, a few days before the maturity of the note, sent Lincoln the money, which he placed in the bank to his individual credit. On the day the note fell due he went to the bank, and, by his individual check, paid the note to the discount clerk, who knew at the time that it was an accommodation note. He did not assume to act as agent for any one, and did not ask to have the note transferred to any one, and did not mention plaintiff's name in any way. It is true that he asked to have the note protested so that he could hold the indorser and maker, but he did not disclose why he wanted to hold them. After he had thus paid and taken it, he sent it to the plaintiff. Upon such a state of facts, did plaintiff take his title from the bank or from Lincoln? If he took it from the bank, he took the

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place of the bank, and his title and right to enforce it were as good as those of the bank at the time he took it. But if he took it from Lincoln, it being past due, he took it subject to any defense defendant could have made if sued by Lincoln, and in such case defendant's defense would have been perfect. He could not be successfully sued by either of the persons for whose accommodation he made the note.

Plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up this note for him. It matters not that the note was protested so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The question is, did the bank transfer or sell the note to the plaintiff? To make a sale or transfer takes two parties, one to sell and the other to buy, and the bank could not be made a seller without its knowledge or consent. It was not bound to sell or transfer the note. All it was bound to do was to surrender it upon payment by the person liable to pay it. A seller in such a case incurs some obligation by the sale, although he does not indorse the paper. He impliedly warrants that the paper is genuine and all it purports to be on its face, and he cannot be drawn into this implied warranty without his consent. *Eastman v. Plumer*, 32 N. H. 238; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Morrison v. Currie*, 4 Duer, 79; *Aldrich v. Jackson*, 5 R. I. 218; 2 Parsons on Notes and Bills (2d ed.), 87. All the bank did in this case was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot, therefore, enforce it against the defendant.

The order of the General Term must, therefore, be affirmed, and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

Clark v. Sickler.

CLARK v. SICKLER, appellant.

(64 N. Y. 281.)

Suretyship — when forbearance to principal does not discharge surety.

The principal debtor upon an overdue promissory note went with the money to pay it to the holder, who declined to receive payment and requested the debtor to keep the money, which he did. *Held*, not to discharge a surety on the note though the principal debtor was then solvent and became afterward insolvent.

APPEAL by defendant from a judgment of General Term affirming a judgment in favor of plaintiff.

The action was upon a promissory note made by one Mott as principal, and defendant as surety. The facts sufficiently appear in the opinion. The note was payable to plaintiff's intestate or bearer, and said intestate held it at the time the offer of payment mentioned in the opinion was made.

L. L. Bundy, for appellant. Defendant was discharged by what took place between Mott and the wife of plaintiff's intestate. *People v. Janson*, 7 Johns. 882; *King v. Baldwin*, 2 Johns. Ch. 554; *Suprs., etc., v. Dow*, 1 Den. 268; 1 Story's Eq. Jur., §§ 824, 825, 826, note 1; *Reynolds v. Ward*, 5 Wend. 501; *Gahn v. Neimcewicz*, 8 Paige, 618; 11 Wend. 312; *Newsam v. Finch*, 25 Barb. 173; *Hart v. Hudson*, 6 Duer, 294; *Grant v. Smith*, 46 N. Y. 97; *Bangs v. Strong*, 10 Paige, 11; 7 Hill, 250; *Ludlow v. Simond*, 2 Cai. Cas. 1; *Fox v. Parker*, 44 Barb. 541; *Miller v. McCann*, 7 Paige, 457; *Rathbone v. Warren*, 10 Johns. 581; *Ruble v. Norman*, 7 Bush, 584; *Wilson v. Edwards*, 6 Lans. 134. An act done by the creditor injurious to the surety is sufficient to discharge surety. *King v. Baldwin*, 17 Johns. 384; *Paine v. Packard*, 18 id. 174; *Hubbly v. Brown*, 16 id. 72; *Smith v. Townsend*, 25 N. Y. 479; *Billington v. Wagoner*, 33 id. 32; *Chester v. Kingston Bk.*, 16 id. 336; *Burgett v. Ellis*, 45 id. 111; *Schroeppel v. Shaw*, 3 id. 446; *Rees v. Berrington*, 2 Ves. 540; *Boyd v. McDonough*, 39 How. Pr. 889; *Wright v. Austin*, 56 Barb. 18; *Thomas v. Stetson*, 59 Me. 229; *Sears v. Van Dusen*, 25 Mich. 351; *Joslyn v. Eastman*, 46 Vt. 258. There was a sufficient tender to discharge surety *Coit v. Houston*, 3 Johns. Ch. 243; *Warrens v. Mains*, 7 Johns. 476; *Douglass v. Patrick*, 3 T. R. 683; *Cornell v. Haight*, 21 N. Y. 462, 465; *Messerole v. Archer*, 3 Bosw. 376; *Benkard v. Babcock*, 27 How. Pr. 395, 491; *Dunham v. Jackson*, 6 Wend. 22, note a, 35; *Bakeman v. Pooler*,

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15 id. 637 ; *Strong v. Blake*, 46 Barb. 227. There was an extension of time and waiver which discharged defendant. *Fellows v. Prentiss*, 3 Den. 512 ; *Myers v. Welles*, 5 Hill, 463 ; *Hart v. Hudson*, 6 Duer, 304 ; *Bangs v. Mosher*, 23 Barb. 478 ; *Holmes v. Dole*, Clark's Ch. 73 ; *Bk. of Albion v. Burns*, 47 N. Y. 175 ; *Fleming v. Gilbert*, 3 Johns. 528 ; *Second Nat. Bk. v. Poucher*, 56 N. Y. 352.

R. M. Townsend, for respondent.

CHURCH, C. J. This action is upon a promissory note made by one Mott as the principal debtor, and by the defendant's intestate as his surety. The referee found that Mott, the principal debtor, some time after the note was due, went to the holder with the money to pay it, which the latter (by his wife acting for him with authority) declined to receive, giving as a reason that he had no use for the money, and requested that Mott would keep it. It is also found that Mott was then solvent, and afterward became insolvent, and the question is, whether the surety is discharged. As a matter of abstract equity, the argument is plausible, at least, that inasmuch as the note was not paid by reason of the request of the holder, the latter ought not to enforce it against the surety after the principal debtor had become insolvent. The general rule applicable to the relation of creditor and surety is stated by Judge STORY as follows: "If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him." 1 Story's Equity, §§ 325, 326, and cases cited in note. The current of authority, which I think is quite harmonious, establishes that the act which will discharge a surety must be legally injurious or inconsistent with his legal rights. An agreement with the principal debtor extending the time of payment, or in any manner changing the contract made by the surety, will have that effect. So the release of a security held by the creditor and the like. The facts found by the referee do not present a case within the rule. The contract was not changed. The time was not extended by any binding agreement. An action might have been brought immediately after the transaction in respect to the payment, and the circumstances which took place would not have constituted a defense. It is well settled that mere indulgence will not discharge a surety. *Thompson v. Hall*, 45 Barb. 214 ; *Schroeppel v. Shaw*, 3 N. Y. 446 ; *Fulton v. Mathews*, 15 Johns. 463. The holder preferred not to collect

the note, and gave indulgence, but not a stipulated extension. The other principle referred to is, that the surety may be discharged from an omission of duty on the part of the creditor, but the surety must intervene and request the performance of the duty. It has been established, accordingly, that if a surety request the creditor to sue, and the latter neglects to do so, the surety will be discharged if the neglect has produced injury. 25 N. Y. 552. Here there was no request. The surety did nothing. He was not prevented from demanding prosecution by the creditor, nor from paying the note and prosecuting the principal himself.

We are now asked to go a step further and hold that if a note is not paid because the creditor prefers to give indulgence rather than receive payment, the surety is discharged if the principal debtor happens to become insolvent. We have not been referred to any authority for such a precedent. The case of *Sears v. Van Dusen*, 25 Mich. 351, was upon a guaranty of collection. It does not appear distinctly upon what ground the court placed its decision; but the question of diligence was necessarily involved, besides the refusal to accept the money when offered, and there was a neglect to prosecute for two years, during which the guarantor became insolvent. The decision was clearly right without the fact of the offer to pay, and that circumstance only aggravated the *laches*. In the case cited from 46 Vt. 258 there was a tender of the money due, which was held to discharge the surety, although not accepted. On the other side, the recent case in this court of *The Second National Bank of Oswego v. Poucher*, 56 N. Y. 848, decided that where a debtor owing two demands offered to pay one of them, and was induced by the creditor to pay the other, the indorsers upon the demand not paid were not discharged. The circumstances which will discharge a surety are well defined by repeated adjudications, viz.: The doing an act which is legally injurious to the surety, or which impairs his legal rights, or the omission to perform a duty when required by a surety, which omission results in injury to the surety. Indulgence to a debtor is not sufficient, and the distinction is not apparent between indulgence, with the express consent or even request of the creditor, and mere silent delay, provided the contract is not changed or impaired. It is a common occurrence for debtors to ask indulgence without any specified time, and creditors would constantly be in danger of losing their debts by mere negative acquiescence. The facts presented in this case rarely occur. It is not often that the debtor omits to pay at the request of the creditor, but if we enlarge the grounds for discharging a surety in such a case, we shall establish a precedent which may prove highly injurious in unsettling and weakening the obligations of written instruments. It is

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better to adhere to established general rules than to attempt to work out equity in exceptional cases.

It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid. There was no tender or attempt to tender the money. The contract was not changed. The surety did not intervene and request any action on the part of the creditor; and although loss has occurred in consequence of the indulgence, it cannot be affirmed that the creditor did any act impairing the legal rights of the surety, nor did the latter take any action to relieve himself from liability.

The judgment must be affirmed.

All concur.

Judgment affirmed.

PATTERSON v. BIRDSALL, appellant.

(64 N. Y. 294.)

Usury — in renewal contract does not taint old contract.

Plaintiff advanced money to pay a mortgage taking another mortgage to secure the advance. The second mortgage was declared void for usury. *Held*, that the usury did not affect the first mortgage, and the second mortgage being void the prior mortgage survived and could be enforced by plaintiff.

A PPEAL by defendant from a judgment of the General Term affirming a judgment in favor of plaintiff.

The action was brought for the purpose of obtaining a judgment subrogating plaintiff to the rights of a prior mortgagee in reference to premises upon which plaintiff held a mortgage which was void for usury. The facts were these: Plaintiff and another held a judgment of foreclosure against premises owned by defendants, and which were subject to a prior mortgage held by one Tompkins. In pursuance of an agreement between the parties the premises were sold under the foreclosed mortgage, and conveyed to one of the defendants. The plaintiffs in that action advanced the moneys due on the Tompkins mortgage, and caused that mortgage to be satisfied. To secure the amount of the indebtedness to them, and also the amount paid upon the Tompkins mortgage, defendants executed to such plaintiffs a mortgage upon the same premises.

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This mortgage was in an action for that purpose declared void for usury. Plaintiffs herein having acquired the entire interest in the indebtedness thus incurred by defendant brought this action. The Supreme Court, at Special Term, granted judgment for the plaintiff, which judgment was affirmed at the General Term.

Geo. B. Bradley, for appellants, cited *Rice v. Welling*, 5 Wend. 595, 598; *Kellogg v. Adams*, 39 N. Y. 28; *Winsted Bk. v. Webb*, id. 325; *Dewitt v. Brisbane*, 16 id. 508; *Schroeppel v. Corning*, 5 Den. 286; *Ellsworth v. Lockwood*, 42 N. Y. 96; *Dauchy v. Bennett*, 7 How. Pr. 375; *Jenkins v. Cont. Ins. Co.*, 12 id. 66-69; 5 Wend. 598, 599; 37 N. Y. 353; 39 id. 325.

Geo. T. Spencer, for respondent.

ALLEN, J. The form which the parties have seen fit to give the transaction, brought under review by this appeal, cannot be ignored, when to do so would be a perversion of justice and against equity and good conscience. The transaction was in substance, as it was in form, so far as the mortgage sought to be enforced by the plaintiff is concerned, an advance of money to the mortgagee in redemption and discharge of the mortgage, and to relieve the premises from the incumbrance in favor and for the benefit of junior incumbrances held by the plaintiff. It was not a loan of money to the defendants, and was not so regarded by the parties. The intent was not to release the mortgage debt or relieve the premises from the incumbrance, but to continue the same in a new form, and to extend the time of payment. The statutes against usury render void all contracts and securities which are the outgrowth of or depend for their support and consideration upon agreements which are usurious. Laws of 1837, chap. 430. Obligations and securities having an independent existence untainted by usury, are not affected by the statute, although they are the subjects of contracts tainted with the vice of usury.

A valid and subsisting debt is not destroyed because included in a security or made the subject of a contract void or invalid, either because violative of the statutes against usury, or for any other reason. Although formally satisfied and discharged, and the security surrendered, it may be revived and enforced in case the new security is invalidated and avoided. *Rice v. Welling*, 5 Wend. 595; *Cook v. Barnes*, 36 N. Y. 520; *Robinson v. Stewart*, 6 Seld. 189; *Farmers & Mechanics' Bank of Genesee v. Joslyn*, 37 N. Y. 353; *Winsted Bank v. Webb*, 39 id. 325; *Gerwig v.*

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Sitterly, 55 id. 214. Within the principle established by the authorities quoted, had the plaintiff, at the time of consummating the usurious agreement, been the holder of the bond and mortgage in suit, and canceled and surrendered the same, in pursuance of the agreement, it would have been revived upon the annulling of the usurious agreement and security, and he could have enforced the same, subject to any intervening equities of third persons that might have come into existence. The debt would not have been extinguished, the substituted contract being void. The defendants could not have availed themselves of the substituted invalid contract as a shield from liability upon the valid obligation. The case is not different in principle, for the reason that instead of satisfying a valid obligation held by himself, he has procured satisfaction by payment of an obligation held by a third person. The debt has not been paid by the debtor, nor released or extinguished, except as it has been included in a new and invalid security, and in equity as well as in law the debt revives in favor of the party who is the equitable owner and entitled to the benefit of it. *Gerwig v. Sitterly*, *supra*. Full effect should be given to the statutes against usury, but nice distinctions should not be favored for the purpose of extending the penalties to cases not within the spirit of the act. In *Dewitt v. Brisbane*, 16 N. Y. 508, and *Schroeppel v. Corning*, 5 Den. 236, referred to by the counsel for the appellant, the assignment of the securities, and not the securities themselves, were held invalid.

The plaintiff, as a junior incumbrancer of the mortgaged premises, had a right to pay the mortgage, and to be subrogated, either by assignment or by act and operation of law, to the rights of the mortgagee; and his act in paying was not necessarily the result of the usurious agreement with the defendants. His rights would have been the same had that agreement not been made, and cannot be held to have been destroyed by reason of his entering into that contract. Equity will give him the same benefit of his redemption as if he had redeemed voluntarily and without having made the illegal agreement with the defendants. The act of redemption may be referred to and sustained by the right rather than the usurious agreement of the parties. In support of the equities of the plaintiff, the usurious agreement may be laid out of view as the moving cause of the redemption. Having at the time of the agreement the right of redemption and subrogation, the agreement of the parties must be construed and carried out with respect to that right. He was the potential owner in equity of the mortgage, in virtue of his right of redemption, and the contract was not different in substance, nor its consummation by the satisfaction of the mortgage different in effect from what it

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would have been had he been the holder and owner in fact. By paying the mortgage he became entitled to a cession of the debt, and a subrogation and substitution to all the rights and action of the mortgagee, and the mortgage must be regarded as against the mortgagors as still subsisting and unextinguished. *Sto. Eq. Jur.*, §§ 685, 1227; *Pardee v. Van Anken*, 8 Barb. 584; *Averill v. Taylor*, 4 Seld. 44; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Jenkins v. Continental Insurance Co.*, 12 How. Pr. 67.

The defendants have the full benefit of the laws against usury when they avoid, as they have done, the contract which was tainted with usury, and can neither in equity or good conscience, or by virtue of any provision of the statute, claim that the pre-existing obligations, free from the vice of usury, which they have not paid or in any way satisfied or discharged, should not be enforced against them. The judgment was right and is well sustained by the reasons assigned at Special Term, and must be affirmed.

All concur.

Judgment affirmed.

WHITE, appellant, v. CONTINENTAL NATIONAL BANK.

(64 N. Y. 816.)

Mistake of fact — payment of altered bill by drawee.

The drawees of a bill are only held to a knowledge of the signature of their correspondent, while the holder of the bill is held to a knowledge of every other fact in respect to it. Accordingly, where the holder of a bill, the amount in which had been altered from \$27 to \$2,750, presented it to the drawee, by whom it was paid, *held*, that the drawee was entitled to recover back the amount paid on discovering the mistake.

The bill was presented and paid August 17. By a delay in examining the advices of the drawee the alteration was not discovered until October 5. *Held*, not to bar a recovery.

APPEAL by plaintiff from a judgment of the General Term affirming a judgment below, and affirming an order below denying plaintiff's motion for a new trial. The action was brought to recover money alleged to have been paid by mistake under these circumstances. A sight draft was drawn upon plaintiff, doing business in New York, by a correspondent in Buffalo, N. Y., for the sum of \$27. Before presentation it was altered so as to make the amount \$2,750. The draft came into defendant's

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hands August 16, from the firm of Austin, Baldwin & Co., who were credited with the amount, and this firm gave the one transferring the draft to it a bill on London for sixty days. On the 17th of August the draft was presented to plaintiff, and by it accepted and paid in full for the altered amount. By the course of dealing between plaintiff and the drawer of the draft monthly statements were rendered. The statement for August was rendered in the early part of September, but was not examined by plaintiff until October 5, when the fact of alteration was discovered, and defendant was notified the next day.

At the trial the court charged the jury thus: "If the jury believe, from the evidence, that if Austin, Baldwin & Co. had been, either directly by the plaintiffs or by them through the defendants, informed within a reasonable time after the acceptance of the draft by the plaintiffs, that the same was forged for an amount exceeding the sum of \$27, they, Austin, Baldwin & Co., or the defendants, could have taken steps to trace and arrest the crime in its consummation, and have prevented the acceptance of their bill of exchange on the City Bank of London, and that they failed to take either of such steps by reason of the acceptance and payment of the draft in question by the plaintiffs, and the failure of the plaintiffs to advise them of such forgery until on or about October 6, 1869, then the plaintiffs are estopped from denying the genuineness of the draft in question, and that the defendants are entitled to a verdict." To this plaintiff excepted and asked the court to charge that all that plaintiff was bound to know when the draft was presented was the genuineness of the signature, and that no duty was incumbent upon it to give notice of the fact that the draft was altered at an earlier time than it gave it.

Hamilton Odell, for appellants. By acceptance the drawee is concluded only as to the genuineness of the signature of the drawer. *Bank of Commerce v. Union Bank*, 3 N. Y. 280; *Bk. of Com. v. Mech. B'king Assn.*, 55 id. 211; *Espy v. Bank of Cincinnati*, 18 Wall. 605; *Holt v. Ross*, 54 N. Y. 471; *Marine Bank and Bank of North America*, 59 N. Y. 305; S. C., 17 Am. Rep. 305; see 14 Am. Rep. 237, notes; *Chapman v. White*, 6 N. Y. 417; Byles on Bills, 11; *F. Bk. v. But. & D. Bk.*, 16 N. Y. 125; *Barnes v. Ont. Bk.*, 19 id. 159; *Meads v. Mer. Bk.*, 25 id. 143; *Mer. Bk. v. State Bk.*, 10 Wall. 647; *Harker v. Anderson*, 21 Wend. 372; *Can. Bk. v. Bank of Albany*, 1 Hill, 291; *Bk. of Commerce v. Union Bank*, 3 N. Y. 286; *Koontz v. Central Bk.*, 51 Mo. 275; *Lawrence v. Am. Bk.*, 54 N. Y. 436; *Contl. Bk. v. Bk. of Comm.*, 50 id. 575; *Kingston Bk. v. Eltinge*, 40 id. 391; 55 id. 215; 18 Wall. 619

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Wm. Allen Butler, for respondent. The charge was proper. *Bk. of Com. v. Nat. Mech. Bk.*, 55 N. Y. 211, 213; *Un. Bk. of Troy v. Sixth Nat. Bk. of N. Y.*, 43 id. 452, 456. There was sufficient to entitle defendant to the benefit of an estoppel. *Cont. Nat. Bk. v. Nat. Bk. of Com.*, 50 N. Y. 575; *Howard v. Hudson*, 2 E. & B. 1; *Knights v. Wiffen*, L. R., 5 Q. B. 660; *Basco Bk. v. Keene*, 53 Me. 103.

ALLEN, J. The right of a party paying money to another under a *bona fide* forgetfulness or ignorance of facts, to recover it back from one who is not entitled to receive it is well established. The equitable action for money had and received will lie against one who has received money which in conscience does not belong to him. *Kelly v. Solari*, 9 M. & W. 54; *The Bank of Orleans v. Smith*, 3 Hill, 560.

The doctrine has been applied, repeatedly, in cases analogous to the present. *Bank of Commerce v. The Union Bank*, 3 N. Y. 230; *Continental National Bank v. National Bank of the Commonwealth*, 50 id. 575; *National Bank of Commerce v. National Mechanics' Banking Association*, 55 id. 211; S. C., 14 Am. Rep. 232; *The Marine National Bank v. The National City Bank*, 59 id. 67; S. C., 17 Am. Rep. 305.

That the plaintiffs in this action paid to the defendant, professing to be the holder of the bill, the face of it, in ignorance of the facts disentitling the defendant to receive the same, is not disputed. Their right to recover the money thus paid must be unquestioned, unless their right is barred by some circumstance which takes the case out of the general rule, or by some act of their own they have lost the right.

Certain general principles, applicable to commercial paper and regulating the rights and obligations of the several parties thereto, are very familiar, and of every day application.

First. The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. *Kelly v. Solari, supra*, Broom's Legal Maxims, 257; *National Park Bank v. The Ninth National Bank*, 46 N. Y. 77; S. C., 7 Am. Rep. 310; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. The Bank of Cincinnati*, 18 id. 604; *Goddard v. The Merchants' Bank*, 4 N. Y. 147.

Second. The defendant, as holder of the bill and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and

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of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. *Erwin v. Downs*. 15 N. Y. 575; *Turnbull v. Bowyer*, 40 id. 456; Story on Promissory Notes, §§ 185, 379, 380, 381. The presentation of the bill, and the demand and receipt of the money thereon, was equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder.

The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant, and not of the plaintiffs. The defendant, in receiving the money, and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, which invalidated the bill and its title to the moneys represented by it.

It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation, there was no estoppel to bar the action. The case is distinguishable from *The Continental National Bank v. The National Bank of the Commonwealth*, *supra*, in this, that in the case cited the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, as he had a right to do, and thus relying neglected to take the means then in his power to retrieve his position and save himself from loss. The court held that the circumstances created an equitable estoppel, and that the bank could not thereafter gainsay the genuineness of the certification which it had adopted, and upon which the other parties had acted. It will be seen that this estoppel was based upon the admission of a fact peculiarly within the knowledge of the bank upon which the check was drawn, and which it was bound to know, and upon a positive assertion upon which the other party had a right to and did rely. In

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this case, as we have seen, the plaintiffs made no assertion of any fact within their knowledge, and the defendant did not act or forbear to act upon the faith of any thing which the plaintiffs said or did, or omitted to say or do.

Again, in the case cited, had the teller of the certifying bank disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the bank of the State of New York before, as the evidence showed, he had received the money on the gold checks, and before he went to the sub-treasury with his gold certificates.

In the case at bar, it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects. There is nothing really in the case to distinguish it from *The National Bank of Commerce v. The National Banking Association*, *supra*, in which the plaintiff recovered.

Should this action be retried other questions may arise not presented by this record, growing out of the relations between the defendant and other parties, and the character in which the defendant acted, whether as agent or principal. Upon the present record the equities are with the plaintiffs. If they fail to recover, they lose the money absolutely and without legal fault on their part. If the defendant is compelled to reimburse the plaintiffs, it has its remedy over against the prior indorsers; and if they in turn have no remedy against the prior indorsers, it is because they have chosen to deal with irresponsible persons, or those of whose character and responsibility they were ignorant. It would be unjust to father the consequences of their method of dealing upon innocent third persons. But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as the case of a mutual mistake, in respect to which neither was in fault and in that view and upon that theory, the case is within the principles decided in *The Bank of Commerce v. The Union Bank*, 8 N. Y. 280; *The Kingston Bank v. Eltinge*, 40 id. 891, and the plaintiffs are entitled to a new trial.

Upon the case as made and upon the exceptions taken at the trial, I am of the opinion that the judgment should be reversed, and a new trial

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granted. RAPALLO, ANDREWS and EARL, JJ., concurred. MILLER, J., dissented; CHURCH, C. J., and FOLGER, J., did not vote.

Judgment reversed.

BRIGGS, appellant, v. PARTRIDGE.

(64 N. Y. 357.)

Agency—contract under seal by agent of undisclosed principal.

An agent appointed by parol, without disclosing his agency made in his own name a contract under seal for the purchase of real estate. *Held*, that the contract was not enforceable against the principal either as a contract under seal or as a simple one.

A PPEAL by plaintiff from a judgment of the General Term affirming a judgment below for defendant. The action was brought to recover money claimed to be due upon a contract for the purchase of lands. According to the complaint and the evidence offered it appeared that defendant had by parol, constituted one Hurlburd his agent, for the purpose of purchasing the lands in question belonging to the plaintiff; that thereupon Hurlburd, without disclosing the agency, entered into a contract under seal with plaintiff, whereby he agreed to purchase such lands at a specified price; that the contract was executed by Hurlburd in his own name, and plaintiff did not at the time know that defendant was the real principal in the matter; a small part only of the purchase-money was paid. Plaintiff in his complaint avowed himself ready to execute a good and sufficient deed. Such other facts as are material appear in the opinion.

Edward D. McCarthy, for appellant.

Wm. F. Shepard, for respondent.

ANDREWS, J. The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the lands

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to Hurlburt, and Hurlburt covenants to purchase and to pay the purchase-money as stipulated. The defendant took no part in the negotiation of the agreement, and the plaintiff, when he made and executed it, had no knowledge that Hurlburt was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the instrument. Hurlburt, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf, and the defendant furnished the money to make the down payment to the broker who negotiated the sale. This action is brought by plaintiff upon the agreement to recover the unpaid purchase-money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburt, the nominal purchaser, was acting for him and by his authority in the transaction. The real question is, can the vendor, in a sealed executory agreement, *inter partes*, for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown. It is not disputed, and indeed it cannot be, that Hurlburt is bound to the plaintiff as covenantor, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase-money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand it is equally clear that Hurlburt's covenant cannot be treated as, or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. *Beckham v. Drake*, 9 M. & W. 79; *Spencer v. Field*, 10 Wend. 88; *Townsend v. Hubbard*, 4 Hill, 351.

In the case last cited, it was held that where an agent duly authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat

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the covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained. It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & Ellis, 594; *Dykers v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bk. of Elmira*, 53 id. 393; *Ford v. Williams*, 21 How. (U. S.) 289; *Huntington v. Knox*, 7 Cush. 371; *The Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Whart. 91; *Browning v. Provincial Ins. Co.*, L. R., 5 P. C. 263; *Calder v. Dobell*, L. R., 6 C. P. 486; Story on Agency, §§ 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated, with the qualification that it applied, when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills

of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 id. 271; *De Witt v. Walton*, 9 N. Y. 570; *Stackpole v. Arnold*, 11 Mass. 27; *Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Beckham v. Drake*, 9 M. & W. 79. That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited. No question would arise under the statute of frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of lands requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. 2 R. S. 135, §§ 8, 9. In this case the contract was signed by the vendors; and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. *Lawrence v. Taylor*, 5 Hill, 113; *Worrall v. Munn*, 1 Seld. 229. But the vendee's contract need not be in writing. *McCrae v. Purmort*, 16 Wend. 469.

We return, then, to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered. No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. *Randall v. Van Vechten*, 19 Johns. 60; *Du Bois v. Del. & Hud. Canal Co.*, 4 Wend. 285; *Lawrence v. Taylor*, 5 Hill, 107; see, also, *Evans v. Wells*, 22 Wend. 324; *Worrall v. Munn*, *supra*; Story on Agency, § 277; 1 Am. Lead. Cas. 735, note.

The plaintiff's agreement in this case was with Hurlburd and not with the defendant. The plaintiff has recourse against Hurlburd on his cove

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nant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by SHAW, C. J., in *Huntington v. Knox*, 7 Cush. 374: "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and, therefore, if made by an attorney or agent, it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

ATLANTIC AND PACIFIC TELEGRAPH COMPANY v. BARNES, appellant.

(64 N. Y. 385.)

Sureties — discharge of, by laches of obligee.

The sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee.

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Seemle, that the rule is otherwise where the default is of a nature indicating want of integrity in the employee, and this is known to the employer.

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment upon a verdict. Reported below, 7 J. & S. 40.

This action was upon a joint and several bond executed by defendants to the plaintiff upon the employment by the latter of defendant, William E. Barnes.

The bond was conditioned, among other things, that said Barnes should "faithfully account for all moneys and property belonging to said Atlantic and Pacific Telegraph Company which shall come to his hands, whether the same shall be paid or delivered to him by said Atlantic and Pacific Telegraph Company to be disbursed or used for its account, or shall be received by him from other persons for the use and benefit of said Atlantic and Pacific Telegraph Company, or shall come to his hands in any other manner."

The bond in question was executed, and Barnes entered into the employment of defendant, December 22, 1873. It was admitted on the trial, that on January 30, 1874, Barnes was in default to the plaintiff in the sum of fifteen dollars and ninety-two cents, of which plaintiff had knowledge, but did not notify the sureties, and continued Barnes in its employ until March 24, 1874, when he was discharged. His default at that time amounted to \$269.67.

A motion on the part of defendants to dismiss the complaint was denied, and the court directed the jury to find a verdict for the plaintiff for the full amount. Defendants duly excepted. A verdict was rendered accordingly.

Exceptions were ordered to be heard at first instance at General Term.

Samuel Hand, for appellants. Defendants were discharged from all liability upon their bond after their principal's default had been discovered by his employer, he having retained him in his employ. *Rallston v. Mathews*, 10 C. & F. 934; *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Sanderson v. Asten*, L. R., 8 Eq. 88; Story's Eq. Jur. 824-826; 2 Vern. 518; 3 Eng. 272; 11 Am. 237; De Colyer on Guar. and Sec. (5th Am. ed.), 434; *Graves v. Nat. Bk.*, 10 Bush. (Ky.) 23. There was an implied covenant on the part of the employer with defendants that he would use ordinary care and diligence during the employment of their

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principal. Fell on Guar. and Sur. 229. Plaintiff's admissions were enough to discharge defendants from all liability after the first default. 2 Vern. 518; 3 Eng. R. 272; L. R., 7 Q. B. 66; L. R., 8 Eq. 73; *Burgess v. Eve*, L. R., 13 Eq. 450, 458; *Hunt v. Roberts*, 45 N. Y. 696; 2 Pars. on Cont. 31; *Rees v. Berrington*, 2 Ves. Jr. 540; Burge on Suretyship, 263; 18 Ves. 20; 7 Hill, 250; 9 Cl. & F. 1, 45, 47; Fell on Guar. and Sur. 449, 518.

MILLER, J. This action was upon a bond executed by the defendants for the benefit of one of them, who was an employee of the plaintiff. About one month after the bond was given, the principal was in default for a small amount, of which the plaintiff had knowledge. He did not notify the sureties of such default, but continued to employ the principal until the default had increased to the amount claimed in the complaint. It is insisted that the failure of the plaintiff to give such notice exonerated the sureties from liability for any subsequent defalcation or dishonesty of the principal during his continuance in plaintiff's service, and that by reason of this neglect they were discharged from liability. The principle contended for is not without sanction, and the question to be determined here is to the application of certain established rules, and the adjudications of the courts to the facts presented upon this appeal.

Judge STORY, in his work on Equity Jurisprudence (§ 324), lays down the rule that "any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditors, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." The English authorities, especially those of a recent date, go very far to uphold the position that the employer is bound to notify those who have become guarantors for the faithful discharge of the duties which the employee has assumed to perform, of any defalcation or dishonesty on the part of the latter, as will be seen by a brief reference to some of the leading cases. In *Railton v. Mathews*, 10 Clark & F. (House Lords Cases), 934, an action was instituted to avoid a bond executed for the fidelity of a commission agent to his employers, upon the ground of concealment of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation, and it was laid down, that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with in the knowledge of the person obtaining the surety bond was undue concealment, though not willful or intentional, or with a view of any

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advantage to himself. In this case the concealment alleged was prior to the execution of the bond, and hence it bears a different aspect than if the facts concealed had transpired after the bond had been executed.

In *Phillips v. Foxall*, L. R., 7 Q. B. 666, where there was a continuing guaranty of the honesty of a servant, it was held that if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during his subsequent service. A later case, *Sanderson v. Aston*, L. R., 8 Exch. 78, upon the authority of *Phillips v. Foxall*, upholds substantially the same principle. See, also, *Burgess v. Bee*, L. R., 18 Eq. 450, 458; *Montague v. Tidcombe*, 2 Vern. 518.

The early adjudicated cases in this State have not gone to the extent of the rule laid down, perhaps for the reason that no case of palpable dishonesty, known to the employer, was actually presented which required the courts to determine the precise question whether notice was demanded under such circumstances. It is not necessary to examine them in detail, as those as well as other cases bearing on the question are fully considered and sharply criticised in the opinion of Judge FOLGER, in *McKecknie v. Ward*, 58 N. Y. 541. In that case an action was brought upon a bond in the penalty of \$2,000, conditioned for the performance by the principal of a contract between him and the plaintiffs, which was recited in the bond, and it was held that a contract of suretyship for the performance, by a vendee, of a continuing agreement of purchase and sale, by which goods purchased from time to time, as required, are to be paid for at stated periods, is not discharged by mere forbearance on the part of the vendor, to enforce payment as provided for by the contract, without a binding agreement for the extension of time. It was there said that mere indulgence of the creditor in such a case was not enough to discharge the surety; that beyond the bare neglect of the creditor to enforce payment, there must be some connivance or gross negligence amounting to willful shutting of the eyes to fraud. The case was distinguished from *Phillips v. Foxall*, and *Sanderson v. Aston*, *supra*, as those related to master and servant, and the obligation incurred was that there should be no breach of duty, and for the honesty of the principal. If, in such a case as the one last cited, connivance and gross negligence will discharge the surety, it would seem that quite as strong reasons exist for discharging sureties where it is known to the master that the servant has been dishonest, and has appropriated

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to his own use funds which he has received by virtue of his employment, and, with full knowledge of such a dereliction of duty, continues to allow such servant an opportunity to increase his defalcation. Such conduct of the master would be a clear violation of the rule which obligates him to do no act which would injure or impair the liability of the sureties.

The bond executed by the defendants in this case provided that the principal should faithfully account for all moneys and property which should come to his hands, and the admission made upon the trial shows that he was in default to the knowledge of the plaintiff, and no notice given of said default to the sureties. The nature of such default and how, or under what circumstances it arose, is not proved, and we are left to inference to determine its origin and real character. In *Phillips v. Foxall, supra*, and kindred cases, the dishonesty of the servant was conceded, and no question was presented as to that fact. While here it is not entirely manifest that the default was occasioned by dishonesty, perhaps temporary absence, sickness or some unavoidable accident may have prevented an accounting by the principal, and delayed payment of the amount in arrears, and it may be accounted for on the assumption that there was no breach of honesty or want of integrity on the part of the servant. If the default of the principal was merely casual, and without fraud or dishonesty, then, within the rules laid down, there was no concealment of material facts, or suppression of proper information, which rendered the contract of the sureties invalid. Where such a defense is interposed the proof should be reasonably clear that the delinquency was caused by dishonest conduct or a gross violation of the obligations imposed by the bond. We think that there is a want of evidence in this respect, and, for this reason, the court was right in denying the motion to dismiss the complaint, and in directing a verdict for the plaintiff.

The judgment should be affirmed, with costs.

All concur, except ALLEN and EARL, JJ., not voting.

Judgment affirmed.

BARNES v. MOTT, appellant.

(64 N. Y. 397.)

Suretyship — purchase of lands subject to judgment — release of lien of judgment.

B. purchased lands subject to a judgment of which he was ignorant, paying value and taking a deed with covenants. Subsequently an appeal was taken by the judgment

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debtor, and the judgment secured by an undertaking. *Held*, that as to the judgment B. occupied a position similar to that of surety, and a release by the judgment creditor of the sureties on the undertaking discharged the lien of the judgment upon the lands purchased by B.

A PPEAL by defendant from judgment of the General Term affirming judgment below. The action was brought to restrain the sale of premises on execution. The facts were these: One Britton, in 1864, owned lands upon which there was a mortgage. There was also a judgment in favor of one Orchard against Britton which was a lien on the lands subsequent to the mortgage. In that year Britton sold the premises to one Burr for full value, conveying the same with covenants subject to the mortgage, but not mentioning the judgment of which Burr was ignorant. Burr's devisees conveyed the premises to one Mrs. Ludlam who conveyed to plaintiff Barnes. Prior to the conveyance to Mrs. Ludlam, the devisees mentioned, in ignorance of the judgment, paid off the mortgage.

When the premises were conveyed to Burr an appeal to the General Term was pending. After an affirmance by the General Term in 1868, the judgment debtor took an appeal to the Court of Appeals, executing an undertaking securing the judgment. The judgment was affirmed by the Court of Appeals, and an action was commenced against the sureties on the undertaking. One Wagner, an attorney for the sureties, settled with the owner of the judgment, and took an assignment of the same to himself, and thereafter, by instrument under seal, released the sureties from all liability upon their undertaking. Wagner then assigned the judgment to defendant Mott who issued execution thereon under which the sale mentioned was threatened.

Wm. F. Shephard, for appellant.

Addison Brown, for respondents.

ALLEN, J. So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off and satisfied by the devisees of Burr, the then owners, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will

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presume such mistake and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities. *Hyde v. Tanner*, 1 Barb. 76; *Runyan v. Stewart*, 12 id. 537, per WELLS, J.

The other and principal question presented by the appeal is more difficult of solution. The plaintiffs, as successors in interest of Burr, the grantee of Britton, the judgment debtor, occupy the same position and have the same rights and equities that he would have had had he continued the owner of the premises upon which the judgment was a lien. The plaintiffs are not technically sureties for the judgment debtor, but, in virtue of their ownership of lands incumbered by the judgment against the grantor under whom they claim title, who conveyed the same for full value with covenants of warranty, they occupy a position very similar to that of sureties, and are entitled to the same equities, so far as they can be administered consistently with the rights of others. The doctrine of subrogation or substitution, at first applied in behalf of those who were bound by the original security with the principal debtor, has been greatly extended, and the principle, modified to meet the circumstances of cases as they have arisen, has been applied in favor of volunteers intervening subsequent to the original obligation, and as between different classes of sureties, and in the marshaling of assets, and prescribing the order in which property and funds shall be subjected to the discharge of different classes of obligations, and as between different classes of creditors, so as to do substantial justice and equity in each case. Story's Eq. Jur., §§ 633, 635, 636; *Bank of United States v. Winston*, 2 Brock, 252; *Ingalls v. Morgan*, 6 Seld. 179.

As grantees of the land with covenants against incumbrances, broken at the instant the grant was made, they might, at any time, but for the stay by the appeal, have paid off the incumbrance and had their action for the full amount paid. *Prescott v. Trueman*, 4 Mass. 627; *Hall v. Dean*, 13 Johns. 105; *Delavergne v. Norris*, 7 id. 358; *Dimmick v. Lockwood*, 10 Wend. 142. But, without respect to the covenants in their deed, the plaintiffs, as the owners of property charged with the debt of another, would, upon payment of the incumbrance, have become subrogated to all the rights of the judgment creditor, and to all the securities which he held for the payment of the judgment. Story's Eq. Jur., § 1227; *Pardee v. Van Anken*, 8 Barb. 534; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Wright v. Morley*, 11 Ves. 12; *Parsons v. Briddock*, 2 Vern. 608.

Had there been other lands incumbered by the same judgment, whether

owned by the judgment debtor or conveyed by him to others, the plaintiffs might have compelled the sale of such lands in that order which would have preserved the rights and equities of all; that is, the sale of the lands owned by the debtor first in order, and then those which had been sold by the debtor in the inverse order of alienation. *Howard Ins. Co. v. Walsey*, 4 Seld. 271; *Guion v. Knapp*, 6 Paige, 35; *Gouverneur v. Lynch*, 2 id. 300. Applying the same principles, had the judgment creditor — with knowledge of the plaintiffs' rights — disqualified himself from transferring to the plaintiffs any securities to which in equity they would have been entitled upon the payment of the judgment, or without their consent released any such securities, or property primarily liable, or dealt with the principal to the prejudice of their rights, the lien of the judgment would have been discharged in equity. *Stevens v. Cooper*, 1 Johns. Ch. 425; *Bank of Albion v. Burns*, 46 N. Y. 170; *Chester v. The Bank of Kingston*, 16 id. 336. These principles are very familiar and of frequent application to all cases of suretyship, or in which parties are pledged, either personally or by incumbrances upon their property, for the debts of others, and there is no distinction recognized between those originally bound and those becoming so by some subsequent act or assent upon their part. The plaintiffs at any time, upon payment of the judgment and becoming subrogated to the rights of the judgment creditor, would have succeeded to the remedies which the latter would have had against the sureties, upon the appeal from the judgment; that was one of the securities which he had and was bound to hold for the benefit of any who stood in the equitable relation of sureties for the payment of the judgment, either by reason of their personal obligation or because their property was bound. Sureties are entitled to be subrogated to the rights of the creditor as against all subsequent sureties. *Parsons v. Briddock*, *supra*. The sureties upon the appeal intervened as volunteers, and by their interposition got time for the principal debtor, to the prejudice of the prior sureties, and of the plaintiffs, whose lands were bound for the judgment, and they must be considered in equity as in the same condition as any other sureties voluntarily undertaking for the payment of the judgment. Their obligation inured to the benefit not only of the creditors but of any and all who had become before them in any way sureties for the payment of the debt. The plaintiffs, therefore, were entitled to the benefit of that undertaking, and the discharge of it without their consent was, in equity, a discharge of their property from the lien of the judgment. *Pott v. Nathans*, 1 W. & S. 155; *Armstrong's Appeal*, 5 id. 352; *Burns v. Huntingdon Bank*, 1 P. & W (Penn.) 395; *Schnitzel's Appeal*, 49 Penn. St. 23. The principle of the

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cases cited from the Pennsylvania reports was adopted and applied, and the doctrine of subrogation, and the rights and equities of different classes of sureties as between each other, well considered in *Hinckley v. Kreitz*, 58 N. Y. 583.

The judgment creditor by discharging the sureties upon the appeal, without the consent or privity of the plaintiffs, and with knowledge of their rights, entitled them to the relief demanded in this action. The obligation and undertaking of the sureties upon the appeal were as much for the benefit of the plaintiffs as of the judgment creditor, and the latter could not discharge the sureties, and at the same time keep the plaintiffs or their property charged with the debt.

Judgment must be affirmed.

All concur, except CHURCH, C. J., not voting.

Judgment affirmed.

DOYLE, appellant, v. LORD.

(64 N. Y. 432.)

Lease — easement of light and air.

Plaintiffs leased a store with the appurtenances in a building occupied by several tenants.

A yard adjoined the building which contained privies for the use of the tenants and furnished light necessary for the back part of plaintiff's store. A door led from plaintiff's store to the yard and a door from a hallway used by all the tenants. Plaintiffs having a privy elsewhere, with the consent of the landlord and for their own convenience, closed up the door leading from their store. Subsequently defendant took a lease of the whole premises subject to plaintiffs' lease and began to excavate in the yard for the purpose of building thereon. *Held*, that plaintiffs had an easement in the yard for light and air and this right was not affected by the closing of the door leading thereto from their store.

A PPEAL by plaintiffs from a judgment at the General Term affirming a judgment below. The action was brought to restrain the erection of a building. The facts appear fully in the opinion.

A. J. Vanderpoel, for appellants.

T. D. Pelton, for respondents.

EARL, J. On the 26th day of July, 1870, Ann Gillett owned a build-

ing, No. 85, on Forsyth street, in the city of New York, five stories high, twenty-five feet wide on the street, and fifty-one feet deep, upon a lot twenty-five feet wide and seventy feet deep. The lower story was then occupied as a store, and the upper stories by families. The space of nineteen feet in the rear of the building was a vacant yard, with the exception of privies thereon, having no communication with any street, and then, apparently, useful for no purpose except as appurtenant to the building. There was a hall-way on the southerly side of the building, extending the whole length thereof, with a door at each end, giving access to the yard; and there was then a door from the lower story into this hall-way, and also in the rear of the store into the yard. There were also two windows in the rear of the store, from which light and air entered the store. The privies were manifestly built to be used with the building, and for the accommodation of its tenants; and we must assume, if it is material, as plaintiffs offered to prove it upon the trial, that the tenants had access to the vacant space and to the privies. While the privies were in this condition, on the day above mentioned, Mrs. Gillett rented the store on the first floor, with the appurtenances, to the plaintiffs, to be occupied as a dry-goods store for the term of five years from the 1st day of May, 1871. The plaintiffs then bought out the prior tenant, and immediately took possession, and continued in the possession of the store down to the trial of this action.

At the time of the lease, the plaintiffs occupied a store on the southerly side of Grand street, a street running east and west, at right angles with Forsyth street, and the rear of that store butted against the rear half of the northerly wall of the Gillett store, and it was agreed that the doors opening from the store into the hall-way and yard should be bricked up to make place for shelves in the store, and that an opening should be made in the northerly wall of the Gillett store and the rear wall of plaintiffs' store, so as to make a communication between the two stores. The plaintiffs did not use the privies on the Gillett lot, as they had one in their own store convenient for use for both stores.

On the 1st day of May, 1874, the defendants took a lease of the whole building and lot, No. 85 Forsyth street, for ten years, subject to plaintiffs' lease, and commenced to excavate in the yard for the purpose of building thereon, and then plaintiffs commenced this action to restrain them.

If the plaintiffs had hired the whole building with the appurtenances, their right to the yard could not have been questioned. The yard belonged to the building and was appropriated to its use, and would pass under a lease of the building as a part of the premises demised. The

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lease would have such effect, because it would be the presumed intention of the parties. In Sheppard's Touchstone (94) it is said that the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling-house, barn, adjoining buildings, orchard, curtilage and garden. In Comyn's Digest (title Grant, E. 6) it is said "by the grant of a messuage or house, the garden, orchard or curtilage pass." In *Whitney v. Olney*, 3 Mason, 280, it was held that a devise of a mill with appurtenances, conveyed not the building merely, but the land under and adjoining, which is necessary to the use, and actually used with it. In *United States v. Appleton*, 1 Sumn. 492, Judge STORY said: "The general rule of law is, that where a house or store is conveyed by the owner thereof, every thing then belonging to and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in and belonged to it."

In the case supposed the yard would have passed with the store, not by force of the word "appurtenances," but as portion of the premises demised. *Riddle v. Littlefield*, 53 N. H. 503. If all the rooms in the building had at the same time been rented to different tenants, each taking his room with the appurtenances, and no mention had been made of the yard, a different case would have been presented. The demise of a room in the building would pass no portion of the yard. Each tenant would take only the room which he hired, and would take no other portion of the premises. Whatever else he took would be by virtue of the word "appurtenances." That word would give him whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and he would take any easement or servitude used or enjoyed with the demised premises. 2 Wash. on Real Prop. 667; Wash. on Eas. 32; *Sheets v. Sheldon's Lessee*, 2 Wall. 177; *Riddle v. Littlefield*, *supra*; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttemeier v. Albro*, 18 id. 48. It would not give him an interest in the yard as a portion of land demised, because land cannot pass as appurtenant to land, but it would give him an easement in the yard in common with all the other tenants, for all purposes for which it could be used in common—for access to the privies, for playground for children, and for light and air for rooms in the rear of the building.

If the different rooms in the building were leased at different times with the appurtenances, the same result would follow. Each tenant would have an easement in the yard. Such, in the absence of restrict-

ive words, would be the manifest intention of the parties, and no rule of law stands in the way of giving effect to such intention.

The yard was attached to and appropriated for the use of the building. The privies were built for the use of the occupants of the building, and the yard was essential to the beneficial use thereof, and as the building was occupied when plaintiffs took the lease, no tenant thereof could well dispense with the use of the yard. The building was so constructed and arranged that all the tenants had access to the yard, and there was no other apparent purpose to which the yard could be subjected. Hence, within every authority to which our attention has been called, the plaintiffs, when they took their lease, acquired an easement in the yard, unless facts to which I will now call attention deprive them thereof. It was agreed between them and their lessor at the time they took their lease, as above stated, that the doors leading from their store into the yard and into the hall-way should be closed up at the expense of the lessor. This agreement was not for the benefit of the lessor, and was not made to cut off any rights which the lessees would otherwise have, but it was made at the request of the lessees and for their benefit, to give them more room for shelves. Having a privy in their own store on Grand street, so long as they used the two stores together, they did not need the use of a privy in the yard. But they did nothing and agreed to nothing depriving themselves of the right to use the privies. They still had access to the yard. There was the hall running the whole length of the south side of the building, with a door opening into the yard at the rear end. This was a way leading into the yard, and in the absence of any restriction all the tenants had the right to use it for access to the yard. The plaintiffs could at any time have had access to the yard and privies through this hall, and could have used them in common with the other tenants.

But even if it should be held that the fact of closing up the doors, and the fact that plaintiffs had a privy of their own, showed that it was not the intention by the lease to give them access to the yard, yet there is nothing to indicate that they were to be deprived of the light and air from the yard. They hired the lower story for a store and the rear windows were the only means to procure light (except artificial) for the proper transaction of business in that part of the store. The light passing into the windows from the yard was essential to the beneficial use of the store, and it was clearly the intention at the time the lease was made that plaintiff should have it. To this extent, in any view of the case, the plaintiffs were entitled to enjoy an easement in the yard. They were so far interested in it, that the defendants could not change its condition to their detriment.

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This conclusion is reached without any departure from what may be called the American doctrine as to light and air, as distinguished from the English common-law doctrine, and the law as laid down in the following authorities is fully recognized: *Parker v. Foote*, 19 Wend. 315; *Palmer v. Wetmore*, 2 Sandf. Sup. Ct. 316; *Myers v. Gemmel*, 10 Barb. 537; *Mullen v. Stricker*, 19 Ohio St. 135; *Haverstick v. Sipe*, 38 Penn. St. 368; *Keats v. Hugo*, 115 Mass. 204; S. C., 15 Am. Rep. 80. Under these authorities, if the lessor had sold the store and lot upon which it stood, twenty-five feet by fifty-one, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any rights of the grantee. In this case, if the yard had not been a part of the lot upon which the building was standing and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint.

I am, therefore, of opinion that defendants had no right to enter upon the yard and appropriate the same exclusively to their use, and thus deprive plaintiffs of all use of the same, and of the light and air passing over the same.

Judgment reversed, a new trial granted, costs to abide event.

All concur.

Judgment reversed.

CASES
IN THE
SUPREME COURT OF ERRORS

CONNECTICUT.

BLACKMAN v. NEARING.

(43 Conn. 56.)

Statute of limitations — computation of time.

In computing the time of the limitation of an action on a promissory note, the day on which it matures is to be excluded ; and the rule is the same where the note is payable at a bank, so that an action might be brought upon it after business hours on the day of maturity.*

ACTION of assumpsit on a promissory note. Defense the statute of limitations.

The note was dated November 21, 1867 ; was payable to the order of plaintiff three months after date at the Home National Bank of Meriden ; was duly presented for payment during banking hours on February 24, 1868, and payment being refused, this action was brought on the same day.

The court held that the action was not barred by the statute of limitations, and rendered judgment for the plaintiff. The defendant moved for a new trial.

O. A. G. Todd, for plaintiff.

D. B. Booth, for defendant.

FOSTER, J. The note on which this suit was brought matured and

* See *Bemis v. Leonard*, 19 Am. Rep. 470 ; S. C., 118 Mass. 502 ; *Menges v. Fricke*, 13 Am. Rep. 731 ; S. C., 73 Penn. St. 137 ; *Westbrook Manuf. Co. v. Grant*, 11 Am. Rep. 181 ; S. C., 60 Me. 88 ; *Warren v. Slade*, 9 Am. Rep. 70 ; S. C., 23 Mich.—RMR.

Blackman v. Nearing.

became payable at bank on the 24th of February, 1868. Service of the writ was made on the 24th of February, 1874. The defense is the statute of limitations.

Is that statute a bar?

If the day the note matured is included in the computation of time, six years had elapsed before action brought; if that day is excluded, the action is within six years.

Our statute which applies to contracts of this description is, "No action shall be brought," etc., "but within six years next after the right of action shall accrue."

This language is simple and free from ambiguity. Its plain, natural import we think is, to exclude from the computation the day on which the paper matures. "Six years next after the right of action shall accrue," must mean "after;" that is, the day on which the claim becomes demandable must be excluded, and the action must be brought within six years next after that day, or it is barred by the statute.

Numerous cases in which this question was involved have arisen and been decided in the courts of Great Britain, and those decisions, unfortunately, are directly contradictory to each other. An examination of them would be rather curious than useful, and would tend to perplex and embarrass more than to aid us in our investigations. As long ago as 1777, in the case of *Pugh v. Duke of Leeds*, Cowp. 719, Lord MANSFIELD, after reviewing many of the cases, said: "Now thus the cases stand down to the 14th of James; they are yes and no, and a medium between them." Some of the cases before and since that time stand on very thin and subtle distinctions, and some indeed recognize distinctions where no differences exist. The expression "from the date," has been held to include the day of the date; "from the day of the date," to exclude it; and then both expressions have been held to mean precisely the same thing, and both to exclude the day of the date. "From the making," has been held inclusive; "from the day of the making," exclusive. So it has been held that where time is to be computed from an act done, the day in which the act is done must be included, with the exception of bills of exchange.

Such a discrimination as this last recalls to mind what Cicero says as to the interpretation of omens in his time. "We regard thunder on the left as the happiest of omens for all things except for holding the comitia." (*Fulmen sinistrum auspicium optimum habemus ad omnes res præterquam ad comitia*.—Cic. de Div., book 2, ch. 35, § 74.) It might be difficult to determine whether the omen or the law had the more reasonable interpretation.

The same unfortunate want of uniformity of decision which we have thus noticed as existing in the courts of Great Britain has prevailed in the courts of the different States of our Union.

The case of *Presbrey v. Williams*, 15 Mass. 193, was an action on a promissory note, and the defence was the statute of limitations. More than six years had elapsed from the date of the note, which was payable on demand, but a payment had been made and indorsed on the note, November 1st, 1811. The action was brought November 1st, 1817, and the court held the statute a bar. The language of their statute was similar to ours—six years next after the cause of action accrued.

Another statute of Massachusetts provided that "No executor or administrator shall be held to answer to any suit that shall be commenced against him in that capacity, unless the same shall be commenced within the term of four years from the time of his accepting that trust. "In the case of *Colden v. James*, 11 Mass. 400, the court, JACKSON, J., says: "The defendant had accepted the trust of administrator on the 2d of December, 1806, and the four years limited by law expired on the 2d of December, 1810." And in the case of *Bigelow v. Wilson*, 1 Pick. 485, it was held that in computing the time allowed by statute for redeeming a right in equity, sold on execution, which must be "within one year next after the time of executing by the officer to the purchaser the deed thereof," the day on which the deed was executed should be excluded.

The precise question now before us was decided by the Supreme Court of New York, in the case of *Cornell v. Moulton*, 3 Denio, 12. It was an action on a promissory note payable on demand. The note was dated February 14th, 1829, and the question was whether a suit commenced on the 14th of February, 1845, saved the operation of the statute of limitations. The court held that it did, though a like decision below was reversed because of the admission of illegal testimony. Chief Justice BRONSON said: "Our cases all go to establish one uniform rule, whether the question arises upon the practice of the court, or the construction of a statute, and the rule is, to exclude the first day from the computation."

As we think the case before us is substantially settled by the decisions in our own State, we are not disposed to examine further the decisions of other tribunals. The cases of *Avery v. Stewart*, 2 Conn. 69; *Sands v. Lyon*, 18 id. 18; and *Weeks v. Hull*, 19 id. 376, were all very fully considered, and bear more or less directly upon the question we are considering. As we concur fully in the views expressed in those cases, it is needless to repeat them.

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It was suggested on the part of the defendant that a note of the description of the one in suit, made payable at bank, became barred by statute one day earlier than if payable generally, because the right of action accrued one day earlier. In the case of *Osborn v. Moncure*, 3 Wend. 170, the action was on a promissory note, brought on the day it became due, after demand of payment had been made and refused. The plaintiff was nonsuited because the action had been prematurely brought. It is not expressly stated, but is perhaps fairly to be inferred, that no place of payment was specified in the note. And in a very recent case, *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430; S. C. 17 Am. Rep. 265, the Court of Appeals of that State held that a demand of payment, by the holder of a note, of the cashier of the bank where the note was made payable, after the close of the customary banking hours, payment being refused, was sufficient to charge the indorser. In that case the indorser had been ready to pay the note, and had sent the maker to the bank several times during the day to see if it was there, and to ascertain its amount. The note was not at the bank, nor was it presented for payment until an hour after bank hours.

The practice of commencing suits on notes payable at bank, on the third day of grace, after their dishonor, is no doubt well established, and we have no disposition to disturb it. But we are strongly opposed to adopting any rule, or giving any construction to the statute, which will fix different periods of limitation to contracts so nearly alike as notes of this character. Instead of making distinctions in cases so nearly identical, the effect of which must be to perplex and mislead, we think it far preferable to have one uniform rule, and make that applicable, generally, to all contracts and obligations of every description, wills, and other legal instruments, statutes, and all proceedings under them. The day of the date, and the day of the act from which a future time is to be ascertained, should be excluded. No rule, however, is to be enforced so sternly as to defeat the intent of the parties; that is always paramount to all other considerations, and is always to be carried into effect, if not contrary to law or public policy.

There is nothing erroneous in the judgment below.

In this opinion the other judges concurred.

Kelsey v. Remer.

KELSEY v. REMER.

(43 Conn. 129.)

Incumbrance — covenant against — attachment — damages.

An attachment of land is an incumbrance within the meaning of a covenant against incumbrances in a deed.

The grantee of lands paid in good faith the amount of a judgment recovered in an attachment suit against his grantor in order to free the lands from the incumbrance of the attachment. *Held*, in an action against the grantor on the covenants in the deed, that plaintiff was entitled to recover the amount so paid if not greater than the value of the land ; and that the fact that the levy of the execution in the attachment suit was irregular was no defense.

ACTION of covenant for the breach of a covenant in a deed against incumbrances.

The defendant in May, 1871, conveyed certain premises to the plaintiff by a deed containing covenants against incumbrances. Prior to such conveyances the premises had been attached in a suit against the defendant's grantor, and subsequent to such conveyance judgment was obtained in said suit. Plaintiff thereupon wrote to defendant for instructions but received none. The sheriff having levied execution under said judgment upon the property, the plaintiff paid the execution creditor the sum claimed and took a quit-claim deed of his interest.

The defendant claimed and offered evidence tending to prove that the levy of the execution was irregular and void ; but of the fact the plaintiff was ignorant when he paid the judgment ; the case was reserved for the advice of this court.

J. W. Alling, for plaintiff.

W. B. Wooster, for defendant.

PARK, C. J. The defendant contends that an attachment of real estate creates no incumbrance upon the land, within the meaning of the covenant against incumbrances, until judgment has been rendered in favor of the attaching creditor, and the land has been set off on execution to satisfy the judgment. This claim is based upon the uncertainty which exists in such cases, whether the attachment will ever be followed by the levy of an execution upon the land. But there is no more uncertainty in such cases in this respect than in many cases of mortgages, whether the property will be eventually foreclosed and the land taken for the debt,

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especially in those cases where mortgages are made to secure parties against future liabilities depending upon many contingencies. It would seem to follow, therefore, that if the claim is sound in respect to attachments, it ought to be sound in respect to such mortgages, and yet the latter are everywhere held to create incumbrances. But in this case the plaintiff did not redeem the land from the attachment till after judgment had been rendered in the suit in which it had been made. At that time it was morally certain that the land would be taken to satisfy the judgment, as there was no personal property on which an execution could be levied. It is true an attempt had been made to levy an execution upon the land, which had failed, and there was some uncertainty whether it would be renewed during the existence of the lien created by the attachment, owing to the ignorance of the party that the execution had not been duly levied. But this fact cannot in any way affect the case. The defendant had no right to presume that the defect in the levy would not be discovered in time for the levy of another execution. The law never creates a right in a party which is dependent upon the ignorance of another party in regard to his rights. It should be taken for granted that the party would discover that his levy was abortive, and would cause another to be made during the existence of the attachment lien.

It is clear that if the judgment in this case did not constitute the attachment an incumbrance upon the property, then an incumbrance, by our law, never can be created by an attachment. For nothing remained to be done but the levy of an execution, and the levy of an execution, by our law in a case like this, transfers to the execution creditor the immediate and absolute title of the execution debtor in the land set off upon the execution.

In some States the levy of an execution operates like a decree of foreclosure in the case of a mortgage. The execution debtor has the right during a certain period of time to redeem the land, and during such time the levy of course continues an incumbrance upon the land. But it is not so in this State in cases of resident debtors. They have no right of redemption after the levy of the execution, and consequently the levy creates no incumbrance upon the land, for it transfers an immediate and absolute title. Rawle on Covenants for Title, p. 94, says, that "every right to or interest in land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, is an incumbrance." An incumbrance, therefore, must be something less than the entire title which the debtor has to the property.

We are satisfied that the attachment in this case created an incum-

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J. W. Alling, for plaintiff.

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PARK, C. J. The defendant contends that an attachment of real estate creates no incumbrance upon the land, within the meaning of the covenant against incumbrances, until judgment has been rendered in favor of the attaching creditor, and the land has been set off on execution to satisfy the judgment. This claim is based upon the uncertainty which exists in such cases, whether the attachment will ever be followed by the levy of an execution upon the land. But there is no more uncertainty in such cases in this respect than in many cases of mortgages, whether the property will be eventually foreclosed and the land taken for the debt,

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especially in those cases where mortgages are made to secure parties against future liabilities depending upon many contingencies. It would seem to follow, therefore, that if the claim is sound in respect to attachments, it ought to be sound in respect to such mortgages, and yet the latter are everywhere held to create incumbrances. But in this case the plaintiff did not redeem the land from the attachment till after judgment had been rendered in the suit in which it had been made. At that time it was morally certain that the land would be taken to satisfy the judgment, as there was no personal property on which an execution could be levied. It is true an attempt had been made to levy an execution upon the land, which had failed, and there was some uncertainty whether it would be renewed during the existence of the lien created by the attachment, owing to the ignorance of the party that the execution had not been duly levied. But this fact cannot in any way affect the case. The defendant had no right to presume that the defect in the levy would not be discovered in time for the levy of another execution. The law never creates a right in a party which is dependent upon the ignorance of another party in regard to his rights. It should be taken for granted that the party would discover that his levy was abortive, and would cause another to be made during the existence of the attachment lien.

It is clear that if the judgment in this case did not constitute the attachment an incumbrance upon the property, then an incumbrance, by our law, never can be created by an attachment. For nothing remained to be done but the levy of an execution, and the levy of an execution, by our law in a case like this, transfers to the execution creditor the immediate and absolute title of the execution debtor in the land set off upon the execution.

In some States the levy of an execution operates like a decree of foreclosure in the case of a mortgage. The execution debtor has the right during a certain period of time to redeem the land, and during such time the levy of course continues an incumbrance upon the land. But it is not so in this State in cases of resident debtors. They have no right of redemption after the levy of the execution, and consequently the levy creates no incumbrance upon the land, for it transfers an immediate and absolute title. Rawle on Covenants for Title, p. 94, says, that "every right to or interest in land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, is an incumbrance." An incumbrance, therefore, must be something less than the entire title which the debtor has to the property.

We are satisfied that the attachment in this case created an incum-

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brance upon the land, and the authorities are in accordance with this view. In *Harlow v. Thomas*, 15 Pick. 69, the court recognize an attachment as an incumbrance upon land. In *Norton v. Babcock*, 2 Metc. 510, the court held that a second attachment of all a debtor's right, title and interest in land is an incumbrance on the land from the time it is made. It will be found upon examination that this case is exactly in point, as is also that of *Johnson v. Collins*, 116 Mass. 392. These cases were actions for breach of covenants against incumbrances, and the breach consisted in the fact that attachments were resting upon the lands at the time they were conveyed. We might cite other authorities upon this subject, but these are sufficient.

It appears in the case that the plaintiff conducted with reasonable prudence and care in regard to the interests of the defendant in the matter; that he had abundant cause for believing, and did believe, that the land would be taken to satisfy the judgment that had been rendered in favor of the attaching creditor, unless he paid and satisfied the same and consequently, after he had made fruitless efforts to obtain instructions from the defendant in regard to the course which he desired him to pursue in the matter, he, in good faith, paid and satisfied the judgment, in order to free the land from the lien created by the attachment. In such circumstances we think the amount paid should be the measure of damages, no claim being made that it was greater than the value of the land attached. It was so held in the case of *Norton v. Babcock*, *supra*, in a similar case, and we think correctly.

We think in cases where judgment has been rendered in the suit in favor of the attaching creditor, and the owner of the land has conducted in good faith toward his covenant or in paying the amount of the judgment in order to free his land from the lien created by the attachment the amount of the judgment should be the measure of damages, if the amount is less than the value of the land attached; but if greater than such value, then the value of the land attached should be the measure of damages.

We advise judgment for the plaintiff.

In this opinion the other judges concurred.

Osborn v. Byrne.

OSBORN V. BYRNE.

(43 Conn. 155.)

Set-off—of deposit in savings bank against indebtedness to bank.

Upon the insolvency of a savings bank, a depositor cannot set off his deposit against a debt due from him to the bank.

Seem that if the deposit was made for the purpose of applying the same in payment of the indebtedness to that amount and the officers of the bank had knowledge of such purpose, then set-off may be allowed.

PETITION for advice by Osborn and others, receivers of the Townsend Savings Bank of New Haven.

The petitioners among other things set forth that a large portion of the assets of said bank consisted of loans made on security by said bank to different individuals and corporations, and that the petitioners found in collecting said loans, that in many cases persons who were indebted to said bank were also depositors of money in said bank, or had received by assignment or transfer the deposits of others, or had become in some other manner the creditors of said bank; and that various questions and claims had arisen concerning the rights of such persons to set off the claims which they held against the said bank against the claims of the bank upon them, and among others the following questions upon the facts as hereinafter stated, to wit:

1. Margaret Byrne, of said New Haven, on the 29th day of July, 1864, borrowed of the said Townsend Savings Bank the sum of \$600, for which sum she gave her note of that date payable to the order of said bank on demand. No demand for payment was made previous to the said appointment of receivers, and said note has never been paid. Afterward the said Margaret Byrne deposited in said bank the sum of \$128.13, with the intention of using said sum for a payment upon said loan, which said sum has never been drawn out and now stands to her credit upon the books of said bank. Can the said Margaret Byrne set off said deposit against her said indebtedness to said bank?

2. Other cases were stated where money had been borrowed of the bank and deposits made but without intent to apply in payment of the loans.

The court found the allegations of the petition to be true and reserved the case for the advice of this court.

W. L. Bennett, for petitioners.

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L. B. Morris, and J. T. Platt, for respondents.

PARK, C. J. Suppose that A should loan to B \$1,000. We will suppose A to be an experienced stockbroker, and that B knowing this fact, and desiring to avail himself of his skill, deposits with him \$1,000, to be invested for his benefit. For a time B receives large returns from A's investments; but at length a reverse comes, and nearly all the money deposited with A is lost. In a suit then brought by A against B for the money loaned, could B set off the \$1,000 deposited with A? No one would claim that he could. But do these depositors, with the exception perhaps of Margaret Byrne, stand in any better condition than B in the case supposed? It was said by this court in the case of *Coite v. Society for Savings*, 32 Conn. 173, that "savings societies are in fact large incorporated agencies for receiving and loaning the money of their depositors." A like view of the subject was taken in the case of *Bunnell v. The Collinsville Savings Bank*, 38 Conn. 203; S. C., 9 Am. Rep. 380. It was there said: "The assets of savings banks consist of loans of money made by them for the benefit of their depositors from whom the money was derived. * * * A depositor knows when he deposits his money with such an institution, that he is placing it at hazard. * * * If the money deposited is lost, the depositor loses it through the instrumentality of his agent, and he has no cause to complain." The bank in that case had met with a loss of twenty-four per cent of all its deposits. The plaintiff, who was a depositor, and to whom had been paid the amount of his deposit, less his proportion of the loss, sought to recover the balance. The court held that he had been paid all that he was entitled to receive. The principle of that case seems to us to meet all the questions at bar, with the exception of that pertaining to Margaret Byrne, which we will soon consider. With this exception no arrangement was made in any of the cases that the sums deposited should be received by the bank in part payment of the sums loaned to the same parties. The deposits and the loans are wholly independent of each other, so much so that it does not appear that the one was made in consequence of the other. Under these circumstances, if the bank was merely an agent, in fact, for the loaning of money deposited with it, as the cases cited clearly show, then it follows conclusively that the parties in this case are in the condition of B in the case supposed, and the set-offs cannot be made. The debts they owe the institution in form belong in fact to all the depositors, but neither the depositors nor the institution owe them any thing more on their deposits than their just proportion of the value of the assets that the institution owns. The difference in amount has been lost — has

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been lost by these parties through the instrumentality of their agent, and they have no right to require that the loss shall fall on the other depositors, who have already suffered in the same way and to the same extent. The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank. Disastrous investments affect each in the same way; and in case of insolvency all that a party who owns deposits in the one case or stock in the other can claim, is his just proportion of what remains at the final winding up of the institutions.

We think the set-offs cannot be made in any of the cases, unless one should be allowed in that of Margaret Byrne. It appears in her case that she made a deposit in the bank, not for the ordinary purposes of a deposit, but for the purpose, and with the intention, of applying the same in payment of her indebtedness to the bank to that amount. If the officers of the bank knew for what purpose the deposit was made, although the amount has never been in fact applied in cancellation of so much of her indebtedness to the bank, we think she should be allowed to set off the amount. We refer her case to the Superior Court for a further hearing in regard to the facts, which are not sufficiently found upon this point. If upon such hearing the facts shall be found as we have supposed them, then we advise that the set-off be allowed.

In each of the other cases we advise the Superior Court to refuse the set-off.

In this opinion the other judges concurred.

THE EVERGREEN CEMETERY ASSOCIATION v. THE CITY OF NEW HAVEN.

(43 Conn. 234.)

Cemetery — taking grounds of, for highway.

A municipal corporation cannot, without special authority given by statute, or by necessary and reasonable implication, take for a highway the lands of a cemetery; and this rule applies to the ornamental parts of a cemetery the same as to the parts used for interments. (See note, p. 647.)

PETITION by the Cemetery Association to set aside an assessment of damages for a street improvement. The opinion states the case. The court below reserved the case for the advice of this court.

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G. H. Watrous, for defendant. The land having been taken for one public use could not be wrested from that use and devoted to another use without special authority. *Trustees of First Evangelical Church v. Walsh*, 57 Ill. 363 ; S. C., 11 Am. Rep. 21 ; *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 255 ; S. C., 4 Am. Rep. 63 ; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 897 ; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 63.

S. L. Bronson, for respondent, cited *Matter of Albany Street*, 11 Wend. 149 ; *Mayor of Baltimore v. Greenmount Cemetery*, 7 Md. 517 ; 4 Bradf. 508, appendix.

CARPENTER, J. The city of New Haven, under the general power conferred upon it to lay out, construct, and maintain all necessary highways within its limits, proceeded to widen and straighten Winthrop avenue, one of its streets, and, in doing so, took a triangular piece of land belonging to the petitioners eighteen and a half feet wide at one end, and about nine hundred feet long. The land so taken is a part of the land consecrated to the burial of the dead, is now used and occupied by a border eight feet wide of shrubbery, evergreens, and other ornamental trees in part, and in part by a portion of Evergreen avenue laid out in the cemetery for the purpose of affording a large number of the owners of burial lots in the cemetery access to their lots ; and without this avenue the owners of a very large number of lots would be greatly inconvenienced, and practically deprived of all access to their lots in carriages. Thereupon damages were awarded to the petitioners and benefits were assessed against them.

This petition is brought to annul the assessment of damages and benefits, on the ground chiefly that the city had no authority to take the land for highway purposes. The power which the city has to take the land is the same as that conferred by general statute upon towns, there being no special power granted to take any part of this cemetery for such purposes.

The petitioners are incorporated under the statute authorizing and regulating the organization of associations for the purpose of procuring and establishing burying grounds or places of sepulture. The association holds the land, comprising the cemetery, subject to the provisions of the law authorizing its organization, and it is now held by the association, except such parts thereof as have been sold to be used and occupied as places of burial, which comprises a large part thereof.

It is further found that the land so taken is needed for the purposes

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of the cemetery, and is not needed for the purpose of widening and straightening Winthrop avenue.

The use of land for a burying ground is a public use, and, for such a purpose, it may be taken, if need be, under the right of eminent domain. The fact that this land is held and used under a deed from the former owner, and was not taken by proceedings *in invitum*, cannot affect the nature of the use. It is held by as high and sacred a tenure as it would have been if the sovereign power of the State, in the exercise of the right of eminent domain, had been called to the aid of the petitioners in acquiring it.

The question then is, whether land already devoted to a public use can be taken by the public for another use which is inconsistent with the first, without special authority from the legislature, or authority granted by necessary and reasonable implication.

There are cases in which it would seem that lands used for a burying ground have been taken by the municipal authorities for highway purposes. *In the Matter of Albany Street*, 11 Wend. 149; *In the Matter of Beekman Street*, 4 Bradf. 508.

But whether they were taken under a general or special authority does not appear; nor does it appear that there was a necessity for taking them in order to exercise the powers granted; but it does appear that the question whether the public had a right so to take them without the consent of the owners, was not made and decided in either of the cases referred to.

That the legislature has the power to authorize the taking of land already applied to one public use, and devote it to another, is unquestionable. *Boston Water Power Company v. The Boston & Worcester Railroad Company*, 28 Pick. 860; *Springfield v. The Conn. River Railroad Company*, 4 Cush. 63; *The City of Bridgeport v. The New York & New Haven Railroad Company*, 36 Conn. 255; S. C., 4 Am. Rep. 63. And this power may be granted either by express words or by necessary implication.

When the power is granted to municipal or private corporations in express words no question can arise. In this case it is not claimed that the respondents were expressly authorized to take the petitioner's land. The question then arises whether, by a reasonable construction of the statute authorizing the respondents to lay out streets and highways, they had the power to take any portion of the petitioner's land for that purpose.

The language is general and broad enough to embrace all lands, whether used for one purpose or another; nevertheless there are cases

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in which it will be presumed that the legislature intended that it should not apply. It will be presumed that land applied to one public use should not be taken and devoted to another use inconsistent with the first unless there is a necessity for it. Thus it will be presumed that the legislature did not intend to authorize a town to lay out a highway along the track of a railway, or along the bed of a canal, as the two uses cannot well exist together. The one necessarily excludes the other. So also a railroad company, unless expressly authorized, cannot lay its track upon a highway; and when permitted, except in special cases, a substitute road must be provided.

On the other hand, a highway may cross a railroad or a canal, as there is a manifest necessity for it, and it may be done without destroying the franchise, in whole or in part, and without seriously interfering with its exercise.

The same land cannot properly be used for burial lots and for a public highway at the same time. The two uses are inconsistent with each other, and the one practically excludes the other. Land therefore applied to one use should not be taken for the other except in cases of necessity. That brings us to inquire whether the necessity exists in the present case. The facts show not only that it does not exist but that there is hardly an apology for taking the land in question. If taken, it renders a very large number of lots in the cemetery inaccessible to carriages. That inconvenience can be remedied only by making a new avenue. That can only be done by taking six lots sold to private parties, all of which have been actually used for burial purposes. How the association is to acquire the title to those lots, unless the owners voluntarily part with it, is not easy to see.

On the contrary there is no difficulty in effecting the desired improvement by taking land on the other side of the street. On this point the finding of the committee is emphatic.

They find that "Winthrop avenue could have been straightened, and widened, and the proposed public improvement made, by taking all the land needed and required for that purpose from the land on the south side of the avenue belonging to private owners, and without taking any of the land from the cemetery association; and that the public good, convenience and needs would have been as fully advanced and promoted thereby as by the lay-out made."

It can make no difference that the part taken was used for shrubbery and a carriage way. A cemetery includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes. All must be regarded alike as conse-

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crated to a public and sacred use. The idea of running a public street, regardless of graves, monuments, and the feelings of the living, through one of our public cemeteries, would be shocking to the moral sense of the community, and would not be tolerated except upon the direst necessity. Yet the right to do so must be conceded, if the action of the respondents in the present case can be vindicated. The right to take one part of a cemetery implies a right to take another; and the right to take one part implies the right to take the whole.

For these reasons we hold that the action of the respondents in taking a part of the cemetery grounds for a highway was illegal; and the Superior Court is advised that the assessment of benefits and damages should be annulled.

In this opinion the other judges concurred.

NOTE.—A court of equity has jurisdiction to grant an injunction to restrain town officers from laying out a highway through a cemetery. *Trustees First Evangelical Church v. Walsh*, 11 Am. Rep. 21; S. C., 57 Ill. 363, or to restrain any unlawful invasion of a burial ground. *Beatty v. Kurtz*, 2 Peters, 566, 584; *Smith v. Bangs*, 15 Ill. 399; *Pierce v. Swan Point Cemetery*, 14 Am. Rep. 667; S. C., 10 R. I. 363; *Moreland v. Richardson*, 24 Beav. 33. Cemeteries will not be subjected to sale to satisfy liens on them for improvements of adjacent streets. *Louisville v. Nevin*, 19 Am. Rep. 78; S. C., 10 Bush, 549. The purchaser of lands upon which is a burial ground may be enjoined from removing the bodies therefrom. *First Presb. Church v. Second Presb. Church*, 2 Brewst. 372. Such action must be brought by the next of kin. *Rousseau v. Tvey*, 49 How. 492.—**REP.**

SMITH V. FORAN.

(43 Conn. 244.)

Master and servant — liability of servant to master for damages occasioned through negligence.

Goods intrusted to a common carrier for carriage, were injured en route by the negligence of the carrier's servant in charge of them. The carrier settled for the damage with the owner of the goods and brought this action against the servant. *Held*, that he could recover of the servant the amount paid to the owner if it did not exceed the actual damage.

ACTION of trespass on the case by Smith and another for an injury to property. The plaintiffs were common carriers, and as such were

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employed to carry a piano from Meriden to Middletown, and there deliver it. The defendant was a servant in plaintiffs' employ, and as such was put in charge of the said piano to safely transport and deliver it to its destination.

By reason of the defendant's negligence, the piano was injured *en route* and plaintiffs voluntarily paid the owner \$155 in settlement of the damage, and brought this action to recover that amount.

The defendant contended that plaintiffs could not recover, as they had paid the damage without compulsion, and without liability having been established by the judgment of a court of law, and the trial court so held, but this judgment was reversed by the Superior Court of New Haven, and the defendant thereupon brought the record before this court by a motion in error.

O. H. Platt, for plaintiff in error.

G. A. Fay, for defendant in error.

PARK, C. J. If the plaintiffs in this case had been the owners of the piano, which was injured through the carelessness of the defendant, it would be clear that the defendant would be liable to them for the amount of the damage done to the property; for a hired servant is as much bound to exercise reasonable care not to injure the property of his employer while engaged in his service, as he is to exercise such care in relation to the property of other persons. There is nothing implied in the contract of employment which absolves him from such responsibility, but, on the contrary, the implication is that he undertakes to exercise such care.

But it is said that the liability of the defendant to the plaintiffs in this case arises from the supposed liability of the plaintiffs to the person whose property was injured by the carelessness of the defendant while engaged in their business, and, this being the case, that the liability of the plaintiffs must first be established in a suit brought by the owner of the property against them, and the amount of damages ascertained before a suit can be sustained by the plaintiffs against the defendant. It is unnecessary to determine how this would be in an ordinary case of a liability of a master for the negligence of his servant, as where the servant in driving the master negligently runs into the carriage of another and injures it. There the master is liable in damages for the act of the servant, and the servant to the master for whatever loss he is subjected to by the servant's negligence. Here, however, another element

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comes in. The plaintiffs, being common carriers, had a special property in the piano and could, as such special owners, maintain an action against the servant for an injury by his negligence to such special property. And besides this, the plaintiffs, by reason of their undertaking as common carriers, were liable to the owner of the piano for its destruction or injury, even though it had been destroyed in the hands of the servant with no fault of his, as where the horses he was driving had run away and broken the piano in pieces, in spite of his careful driving and of his efforts to control them. The liability of the plaintiffs stands upon its own ground, their implied contract to deliver the piano in good condition at its place of destination, in spite of all obstacles except those caused by the act of God or of a public enemy. And this liability rests upon no other ground where the delivery is prevented by the negligence of their servant. He is liable to them for his negligence, they to the owner for non-performance of their undertaking.

But the two kinds of liability have this in common, that where, as here, the carrier fails to deliver the property solely because of its destruction or injury by his servant, the amount of damage to which the carrier is liable at the suit of the owner is precisely the same as that to which the servant is liable at the suit of the carrier. And upon this fact the counsel for the defendant base their claim that the plaintiffs should have first had their liability and the exact amount of it established in a suit at law before they could maintain a suit against the defendant. But the reason of the thing is wholly against this claim. In the first place, if the plaintiffs were liable to the owner of the piano, it is absurd to require the owner to bring a suit, and the plaintiffs to defend against it, and finally pay, after a judgment and with costs, what they were perfectly willing to pay at the outset, and what the judgment would show they were legally bound to pay. And in the next place, the judgment would not establish the liability of the defendant. That, as we have seen, would stand upon its own ground, and his negligence, on which alone his liability would rest, would not even enter into the suit against the plaintiffs as a matter for consideration. He could still, in the suit against him, deny the fact of his negligence, and could prove the amount of the damage. All this he could do if the plaintiffs had settled with the owner without suit. If in such settlement they had paid the owner more than the actual damage, such payment would not have bound the defendant. He would be liable to them only for the actual damage. If, however, they had settled with the owner for less than the real damage, they could recover of the defendant no more than the damages paid. The damage which the defendant is to pay is the actual damage to the plain-

tiffs. That of course cannot be greater than the sum they have had to pay, though it may be less, if they have unnecessarily and of their own folly paid more than they were obliged to pay. They were bound to pay the actual damage done to the piano, and if they got off with paying less, then they were themselves damaged so much less, and could recover only such reduced sum from the defendant.

Until the plaintiffs have settled with the owner it is to be presumed that they will be compelled, either upon a voluntary settlement or upon suit, to pay the owner the actual damage. If the defendant had reason to suppose that a settlement could be effected for a less sum, he could himself settle with the owner, and save the plaintiffs from the necessity of paying the damages at all; and this it would be equally his duty and his interest to do.

We think there is no error in the judgment complained of.
In this opinion the other judges concurred.

MIDDLEBROOK v. STATE.

(43 Conn. 257.)

Contempt — proceedings to punish for — sentence — presence of offender.

Proceeding to punish for contempt of court is not a criminal proceeding within a statute denying criminal jurisdiction to a court.

A sentence for contempt committed in the presence of the court is valid though pronounced in the absence of the offender.

W RIT of error to reverse a judgment of the Court of Criminal Pleas, of Fairfield county, inflicting a fine and imprisonment upon Middlebrook for a contempt of court.

The opinion states the case:

L. M. Sturger and D. Davenport, for plaintiff.

J. H. Olmstead, State's attorney, and W. K. Seeley, for the State.

CARPENTER, J. The plaintiff in error made a gross assault upon William K. Seeley, Esq., in open court, and immediately left the court-house

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and the State. After making reasonable effort to procure his attendance in court, the Court of Common Pleas rendered a judgment, sentencing him to pay a fine of \$100 and costs, and to be imprisoned in the common jail for thirty days, for a contempt of court. This writ of error is brought to reverse that judgment.

The questions involved in this case are mainly questions of jurisdiction; therefore it must not be regarded as a precedent, inducing the belief that in all proceedings for a contempt questions of law will be reviewed by this court as in other cases.

The plaintiff in error claims that the judgment is *coram non judice*;

1. Because the statute expressly denies criminal jurisdiction to the Court of Common Pleas.

This is not a criminal proceeding within the meaning of the statute. The fine and imprisonment which the court is authorized to inflict for a contempt are not intended as a punishment for a crime committed in violation of the criminal law; and punishment for the contempt is no bar to a prosecution for a breach of the peace, notwithstanding the universal maxim that no one shall be put in jeopardy twice for the same offense. Courts of chancery and probate courts have no criminal jurisdiction; and yet it will hardly be denied that they have the power to punish for contempt.

[The court then decided an unimportant point.]

3. It is further objected that the proceeding is erroneous for the reason that the plaintiff was not present in court when the judgment was rendered, and that he had not been heard in reference to the matter. It is not averred, nor is it claimed, that he was denied a hearing, or that he had no opportunity to appear and purge himself of the contempt and offer any matter in mitigation that would have been of any avail. It is expressly found that he absconded for the purpose of avoiding this proceeding. It also appears that the court attempted to serve notice upon him to appear and answer, that an attachment was issued and returned *non est*, and that his counsel, in the case which was on trial when the assault took place, was also notified to appear and be heard. All this would be of no avail in a case in which service of process is essential to give the court jurisdiction over the person. But it is important in a case where the court once has full jurisdiction, and the question is not whether it has been acquired, but whether it has been lost. If jurisdiction once attached the court could not be deprived of it by the mere flight of the offender.

We have already seen that the court had jurisdiction over the subject-matter. Did it extend over the person also? We think that it did.

The offense was intentionally committed in the presence of the court. When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offense was committed he was in the presence, and, constructively at least, in the power of the court. He may by flight escape merited punishment; but that cannot otherwise affect the right or the power of the court. Before the court could exert its power, the offender, taking advantage of the confusion, absented himself and went beyond the reach of the court; but nevertheless the jurisdiction remained, and it was competent for the court to take such action as might be deemed advisable, leaving the action to be enforced and the sentence carried into execution whenever there might be an opportunity to do so. If it was necessary that the judgment should be preceded by a trial, and the facts found upon a judicial hearing, as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act, the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.

It will hardly be denied that the court might have done that the instant the offense was committed and before the plaintiff had left the courtroom. We think it is equally clear that the judge was not bound to do it at once, but might do it within any reasonable time before the term closed. The delay was manifestly for the plaintiff's benefit and in no sense to his prejudice, the time being improved in fruitless attempts to secure his presence in court. It seems reasonably clear that he has no just grounds for complaining of the delay.

Another assignment of error is that the record does not state when the term of imprisonment is to commence.

There is no force in this objection. If in any case this is necessary it cannot possibly be required in a case like this, where the offender is at large, and there is no certainty when, if ever, he will be arrested. Such a requirement would practically nullify the sentence and defeat the end sought to be accomplished.

The only remaining question relates to the costs. It is insisted that it was error in the court to require the plaintiff to pay the costs. This objection must prevail. It is apparent from what has already been said that there was no necessity for incurring costs in attempting to notify the plaintiff or to bring him into court. Costs unnecessarily incurred cannot justly be taxed against the delinquent.

 Geery's Appeal.

The statute manifestly does not contemplate any process or any proceedings requiring costs prior to the judgment, and it is silent in respect to the costs. It limits the pecuniary punishment to the sum of \$100. In some sense costs when properly taxable are regarded as a part of the punishment; and if the delinquent may be required to pay, in addition to a fine of \$100, costs accruing before the judgment, it practically punishes him beyond the limits allowed by law. It may be otherwise with costs accruing after judgment in attempting to collect the fine. Such costs may be saved by paying the fine.

That part of the judgment, therefore, is erroneous and must be reversed. But as the judgment is manifestly divisible, that which relates to the costs alone is reversed; and the judgment in respect to the fine and imprisonment, being legal, is affirmed. *State v. Taff*, 89 Conn. 82.

In this opinion the other judges concurred, except FOSTER, J., who dissented.

 GEERY'S APPEAL.

(43 Conn. 289.)

State insolvent laws — not wholly superseded by bankrupt law — when compulsory proceedings under State laws will be sustained.

State insolvent laws are not wholly superseded by the Bankrupt Act; therefore compulsory proceedings under a State law to distribute the assets of an insolvent debtor were *held* valid, it appearing that the debtor declined to go into voluntary bankruptcy, that he had committed no act of bankruptcy of which the creditors could avail themselves, and that the proceedings could not obstruct his becoming a voluntary bankrupt and obtaining a discharge as such.

A PPEAL from a decree of a court of probate appointing a trustee of the Guinness Sewing Machine Company. The opinion states the case.

J. B. Curtis, for appellant. 1. The insolvent law of Connecticut, in relation to involuntary insolvency, contravenes the 5014th and 5021st sections of the bankrupt law of the United States (pages 975 and 976 of the Revised Statutes of the United States), and is therefore suspended, and all proceedings under it are absolutely void. The 5014th section specifies only two requisites in order to entitle a person to be declared a bankrupt. 1st. That

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he shall owe debts exceeding \$300 ; 2d. That he shall be unable to pay all his just debts in full. And any person coming within the above-mentioned conditions is entitled to be declared a bankrupt. In what manner, then, do proceedings in involuntary insolvency, under the statute of Connecticut, conflict with the provisions of the bankrupt law last mentioned ? The statute, as to involuntary insolvency, requires that an attachment shall issue ; that a demand shall be made by the officer upon the debtor for estate to satisfy the attachment ; that the officer shall be unable to find estate on which to levy to satisfy the attachment ; and that the debtor shall fail to pay or secure the debt satisfactorily to the court of probate. Now, in order to give the court of probate jurisdiction under the statute regarding insolvency, it must appear that the insolvent is indebted, that an attachment has issued thereon, and that he cannot satisfy the attachment. If it appears that he owes debts exceeding \$300, then he is indebted in a sum sufficient to bring him within the 5014th and 5021st sections of the bankrupt act. If he has no property to satisfy the attachment, and is unable or fails to pay or secure the debt for which the attachment issues, then he is unable to pay all his just debts in full, and his case equally comes within said 5014th section. For this reason, if the officer fails to find property, or the bankrupt refuses to turn it out or refuses to pay or satisfy the debt, his inability or failure so to do arises from one of two causes. One of these is, that his property has been levied upon, or absorbed in the payment of debts, or squandered or destroyed. If either of these causes has rendered him unable to pay his just debts, the fact brings his case directly within the provisions of said 5014th section. The other is, that he has concealed, removed or conveyed away his property to avoid his debts, and this renders him alike unable to pay his just debts in full, and brings him equally within the provisions of said 5014th section. But if he has concealed, removed or conveyed away his property to avoid his debts, and has thereby become unable to respond to the attachment, or pay or secure the debt for which the attachment issues, then his case is brought directly within the third division of the 5021st section of the bankrupt law. Thus the condition of the debtor, which would warrant the intervention of the court of probate by proceedings in insolvency, would be precisely the condition that would enable the courts of the United States to hold jurisdiction by proceedings in bankruptcy.

2. The power granted to Congress by the Constitution is the power to establish uniform laws on the subject of bankruptcy throughout the United States, and Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on

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the subject, and this establishment of uniformity is incompatible with State legislation on that part of the subject to which the acts of Congress may extend. *Sturges v. Crowninshield*, 4 Wheat. 122. Two statutes, having the same general object and acting upon the same persons and same cases, by different modes and in different jurisdictions, must be in conflict with each other. Though the mode by which the remedy is administered may vary, yet where the bankrupt act and the State law have substantially the same scope and object, and act upon the same persons and cases, the State law is suspended. The act of Congress is both a bankrupt act and insolvent law. *Martin v. Berry*, 2 Bankr. Reg. 629; S. C., 37 Cal. 208; *Van Nostrand v. Carr*, 2 Bankr. Reg. 485; S. C., 30 Md. 128.

3. The bankrupt act, as soon as it took effect, *ipso facto* suspended all actions upon future cases arising under the insolvent laws of the State. Where the insolvent laws act upon the same subject-matter and the same persons as the bankrupt law, all proceedings commenced under the State laws, after that time, are null and void. *In re Eames*, 2 Story, 323; *Bishop v. Loewen*, 1 Penn. L. J. 364; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 id. 273; *Griswold v. Pratt*, 9 Metc. 16; *Commonwealth v. O'Hara*, 1 Bankr. Reg. 86; *Perry v. Langley*, id. 559; S. C., 7 Am. Law Reg. 429; *Van Nostrand v. Carr*, 2 Bankr. Reg. 485; *Martin v. Berry*, 37 Cal. 208; *Corner v. Miller*, 1 Bankr. Reg. 403; *In re Reynolds*, 8 R. I. 485; S. C., 5 Am. Rep. 615; *Shepardson's Appeal from Probate*, 36 Conn. 23; *Cassard v. Kroner*, 4 Bankr. Reg. 569; *In re Independent Insurance Co.*, 6 id. 260; *In re Reiman*, 11 id. 38; *Watson v. Citizens' Savings Bank*, id. 162; *Lavander v. Gosnell*, 12 id. 284.

4. The case of *Hawkins' Appeal from Probate*, 34 Conn. 548, and *Maltbie v. Hotchkiss*, 38 Conn. 80; S. C., 9 Am. Rep. 364, only lay down this doctrine, that an assignment for the benefit of creditors is a right existing at common law, and the statute in relation thereto is only in regulation of the right; and that, if no proceedings are instituted in bankruptcy within six months previous to the date of such assignment, such assignment is valid, notwithstanding the bankrupt law. But the law has been held otherwise by the District Court of the Southern District of Ohio. *Perry v. Langley*, 7 Am. Law Reg. 429. These cases do not in any manner affect the question involved in the case under consideration.

O. G. Child and *W. O. Strobbridge, Jr.*, for appellee. It will be noticed that the only facts tending to show the condition of the

corporation in question are, that it is unable to pay its debts, and that such indebtedness exceeds the sum of \$800. No act of bankruptcy is alleged; no intimation is made of proceedings in the United States court; no facts are given to lay the foundation of a proceeding in bankruptcy under the laws of the United States, and the real question resolves itself into this: The law of the State of Connecticut provides a remedy for a creditor upon a certain state of facts, by means of which the debtor's property is placed in the hands of a trustee for the benefit of his creditors. The bankrupt law of the United States upon such facts provides no remedy whatsoever, and has no jurisdiction in the premises. Is the State law inoperative and null? We claim that it is suspended by the national bankrupt act only so far as the provisions of the United States law apply to the subject-matter of the State law; and that, where the United States law does not apply to the subject-matter of the State law, the State law is in full force; and *a fortiori*, where no jurisdiction exists in the United States court, it cannot interfere with or supervise or control the State court.

1. This is shown by the intent and clear implication of the bankrupt act itself. The District Courts of the United States are the courts of bankruptcy; they are authorized by the first section of the act "to hear and adjudicate upon [matters of bankruptcy] *according to the provisions of this act.*" And by section 568 of the United States Revised Statutes the District Court has original jurisdiction in all matters and proceedings in bankruptcy, and by section 711 this jurisdiction is exclusive. But the proceedings in bankruptcy over which jurisdiction is given are not deemed commenced until a petition is filed. *Id.*, § 4991. By section 5014 voluntary bankruptcy is limited to persons owing more than \$800, and whose debts are provable under the act; and by sections 5021-5023, the means by which a proceeding *in invitum* can be had, and the property of the debtor applied to the payment of his debts, are set out. The act provides a remedy against one owing debts provable by section 5014, under special circumstances, occasioned by the act of the debtor *and* by action on the part of the creditors, within a limited time after the acts of the debtor have been consummated. Until the debtor commits these acts there is no power on the part of creditors to commence proceedings, and no power on the part of the court to adjudicate the debtor a bankrupt. Again, before the court has jurisdiction to enforce this section of the statute and adjudicate a debtor bankrupt, *the creditors must act*; and unless one-fourth at least in number, and owning debts aggregating one-third of the debtor's entire provable debts, petition, and that within a limited period after the commission of the act of bank-

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ruptcy, the court has no power in the premises, and no proceedings in bankruptcy can be commenced. When, therefore, debts are less than \$300; where no act of bankruptcy has been committed; where the period after such act exceeds the statutory time; where the requisite number of creditors and essential amount of debts are unrepresented, the bankrupt act provides no means by which an assignee can be appointed under *in invitum* proceedings; no way in which proceedings can be commenced. Certainly the exercise of the State court's jurisdiction, when Congress has removed the subject-matter out of its own control, is legitimate and proper, and intended by Congress to be exercised. The whole intent of the act is to vest jurisdiction in certain classes of cases, and to afford relief in certain ways, but in other respects to assume no jurisdiction. The courts of the United States having no common-law jurisdiction, unless expressly given by statute, Congress could not have intended to divest courts which had already acquired jurisdiction existing under State laws, by implication or inference. *Wilson v. City Bank*, 17 Wall. 473, 485; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 135. Nor does the constitutional provision conflict with our position, for the question is no longer open that the State can pass insolvent and bankrupt laws, that the right is not vested solely in Congress, and that where the State has jurisdiction, in the absence of the laws of Congress, it can exercise it. *Sturges v. Crowninshield*, 4 Wheat. 122; *Gibbons v. Ogden*, 9 id. 197, 227, 235, 238; *Houston v. Moore*, 5 id. 34, 49, 52, 54; *Baldwin v. Hale*, 1 Wall. 228. The right, therefore, to enact a national bankrupt law remains dormant until called into exercise by Congress, and all State insolvent or State bankrupt laws during that period are in full force, only limiting the operation of the discharge to the State in which it is granted. *Hempstead v. Reed*, 6 Conn. 480; *Norton v. Cook*, 9 id. 314. But in the courts of such State, upon contracts made within the State between its own citizens and suitors, it is conclusive. See *Baldwin v. Hale*, 1 Wall. 223, 231, 232. There was a State insolvent law in Connecticut, both voluntary and involuntary, when the bankrupt act of 1867 was enacted; it has never been repealed. The effect of the latter act is to *suspend*, not annul such State laws. There can be no question that the repeal of the national act would leave the State law in full force. We claim, therefore, that when Congress has legislated upon a system of bankruptcy (conceding that in all respects in which that law clashes with a State law the act of Congress is supreme), the State law is only *dormant* in cases over which the United States law assumes jurisdiction, and just in that degree in which the amendments to the original bankrupt act further limit the jurisdiction of

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the United States, the State law revives *ipso facto*. And we deny as unsound the claim that, by the constitutional power to establish a uniform system of bankruptcy, Congress can, by exercising jurisdiction over a part of the subject-matter of a State insolvent law, suspend its exercise in matters not within the scope of the act of Congress; and that it makes no difference whether this be involuntary or voluntary insolvency.

2. Such is the construction of the courts. In *Ex parte Eames*, 2 Story, 822, the suspension of the State law is limited to *persons within the purview of the bankrupt act*. If persons not within the purview of the act are not affected, are debts, acts, and causes of action not within its purview affected? In *Griswold v. Pratt*, 9 Metc. 16, the limitation is applied to "the same persons, the same contracts, and the same assets." *Ziegenfuss's case*, 2 Ired. (Law) 463, is to the same effect, only it carries the doctrine farther, and farther than we need to go. So also *In re Reynolds*, 8 R. I. 485; S. C., 5 Am. Rep. 615, where it is held that the operation of a State law is suspended so far as the provisions of the act of Congress apply to its subject-matter. Cooley's Const. Lim. 293. The Court of Appeals of New York, in *Cook v. Whipple*, 55 N. Y. 150; S. C., 14 Am. Rep. 202, recognizes the position we claim. In *Ex parte Winternitz*, 18 Pittsb. Leg. Jour. 61, Judge LUDLOW, of the Court of Common Pleas of Philadelphia, recognizes our claim strongly. And the first bankrupt act of April 4, 1800, recognizes, in the 61st section, our claim in express terms. 2 U. S. Statutes at Large, p. 86. And see, on the limitations of this law, *Clarke v. Ray*, 1 Harr. & Johns. 318, 329, 330; *Harter v. Harlan*, 7 Bankr. Reg. 238; *In re Campbell*, 1 id. 165; *In re Burns*, id. 174; *Clark v. Bining*, 9 Am. Law Reg. (N. S.) 305. See, also, *Langley v. Perry*, 2 Bankr. Reg. 598, in which case Judge SWAYNE reverses the judgment of *Perry v. Langley*, 7 Am. Law Reg. (N. S.) 429; and recognizes the State law where an act of bankruptcy has not been committed. And see also on this point, *In re Nickodemus*, 3 Bankr. Reg. 280, 282, where Judge WHITNEY holds that, in addition to indebtedness, at least one of the acts of bankruptcy enumerated must be shown. The facts proved in this case show simple indebtedness, and inability to pay debts exceeding \$300. Certainly this is no act of bankruptcy as set forth by the bankrupt act. The State law provides for the protection of an attaching creditor, and unless the claim is satisfied, places the debtor's property in the hands of a trustee. The main object of the law is to protect the creditor's effort to secure his claim and prevent a preference by allowing other creditors to intervene. The bankrupt act, however, requires some act to be done by the

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debtor which amounts to a fraud upon the act, before any jurisdiction can attach to the Federal courts. The scope and intent of the laws are essentially different, and in no way conflict with each other. It will also be noticed that the bankrupt act is limited to persons residing within the jurisdiction of the United States ; while, under the State law, the creditor's residence alone gives jurisdiction. The Supreme Court of Iowa, in a review of all the authorities, recognizes our claim, and goes almost the length of *Ziegenfuss's case, supra*, by holding the State law in force till the national law attaches. In the case at bar the national law can never attach. *Reed v. Taylor*, 32 Iowa, 209 ; S. C., 7 Am. Rep. 180. And in *Baldwin v. Hale*, 1 Wall. 238, *supra*, the United States Supreme Court recognizes the right of a State to pass an insolvent or bankrupt law, provided there be no act of Congress establishing a uniform system of bankruptcy *conflicting with such law*.

8. We have thus far cited cases outside of our own State. But our own decisions are in harmony with these views, and fully support our claim. *Hawkins' Appeal from Probate*, 34 Conn. 548 ; *Shepardson's Appeal from Probate*, 36 id. 23, 25 ; *Maltbie v. Hotchkiss*, 38 id. 80 ; S. C., 9 Am. Rep. 364.

CARPENTER, J. The facts of the case may be briefly stated. The appellant is a creditor of the Guinness Sewing Machine Company, a corporation, and attached property to secure his claim. The appellee, another creditor, instituted proceedings in insolvency under the statute of this State for the purpose of procuring an equal distribution of the property of the corporation among its creditors. The court of probate appointed a trustee, and the attaching creditor appealed to the Superior Court, claiming that the bankrupt act of the United States suspends the operation of the State law. The corporation is unable to pay its debts, and those debts exceed the sum of \$300. The company is in a condition to apply voluntarily for the benefit of the bankrupt act, but it has committed no act of bankruptcy, and is not subject to compulsory proceedings.

We are impressed with the magnitude and importance of the questions now before us. All questions relating to the conflict of a State law with the Constitution or laws of the United States are necessarily of a delicate nature, and should receive careful consideration. We have endeavored to give them all the consideration their importance demands.

The case is a close one and by no means free from doubt and difficulty. After careful consideration, looking as far as possible to probable consequences and practical results, and at the same time bearing in mind

our obligation to respect and uphold the Constitution and laws of the United States, a majority of the court, with some hesitation, have come to the conclusion that the action of the court of probate should be affirmed. In doing so we recognize the supremacy of the act of Congress, and recognize and approve the well-established principle, that so far as that act assumes and takes jurisdiction of the parties and the subject-matter, just so far is the jurisdiction of the State court excluded. On the other hand, we contend that in respect to all persons and matters over which the bankrupt act declines to take jurisdiction, the statute of this State remains in full force.

The question, then, for us to determine is, whether this case, upon the facts stated, is within the jurisdiction of the act of Congress. In determining this question we must have regard primarily and principally to the intention of Congress as expressed in that act. That intention, when discovered, will be a sure guide to a correct conclusion.

There are two divisions of the bankrupt act ;—*voluntary*, where the debtor himself sets in motion its machinery ; and *involuntary*, where it is set in motion by creditors. In either case an act of bankruptcy is essential. Without an act of bankruptcy the Federal court can have no jurisdiction.

The filing of the petition by the debtor is expressly made an act of bankruptcy, and authorizes the bankrupt court to proceed and settle the estate of the debtor. No such petition has been filed in the present case, and, therefore, the jurisdiction of the court, under the voluntary branch of the act, does not attach. It is true a case exists ; the corporation is owing over \$800, and is unable to pay its debts. It may, if it will, institute proceedings in bankruptcy ; but it has not yet done so, and it is wholly at its own option whether it ever will. There is and can be no compulsion.

The right of the debtor to file a petition, and the possibility that he may do so, do not of themselves bring the act of Congress in conflict with the State law ; for the right, and the power to exercise the right, exist in all cases of insolvency ; and yet the debtor may voluntarily make an assignment under the State law, and such assignment and proceedings under it will be valid unless proceedings in bankruptcy are instituted within six months thereafter. *Maltbie v. Hotchkiss*, 38 Conn. 80 ; *Mayer and others v. Hellman*, 91 U. S. 496.

It seems clear that voluntary assignments under the State law are only contingently affected by the act of Congress. We see no good reason for holding that compulsory proceedings by a creditor are prohibited, where, as in the present case, the debtor declines to go into bankruptcy ;

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there has been no act of bankruptcy, and the proceedings are not in fraud of the bankrupt act ; the sole object and effect being to prevent a preference of other creditors and compel an equal distribution of the assets.

We have come to the conclusion, therefore, that the first branch of the bankrupt act does not apply to the case before us, and that the case is not yet within the purview of that act in such a sense as to suspend the operation of the State law.

The second branch of the bankrupt act — involuntary bankruptcy — remains to be considered.

Under this division proceedings can only be instituted by creditors ; and such proceedings correspond very nearly to proceedings in bankruptcy as distinguished from proceedings in insolvency under the English practice ; and proceedings instituted by the debtor under the first division bear some resemblance to proceedings in insolvency under that practice. This is partially true of our State law. And hence compulsory proceedings under it on account of their fancied or real resemblance to proceedings in bankruptcy in England, have been regarded, but without very good reason, as more obnoxious to the bankrupt act than voluntary assignments, and it has been supposed that the latter may be sustained while the former cannot. In this connection it may be well to notice the distinction between bankruptcy and insolvency, and call attention to the present state of the law on that subject in this country.

Bankruptcy applied only to merchants, traders, etc. ; proceedings were instituted *against* the debtor by creditors, but only after an act of bankruptcy had been committed—such as absconding from the realm, secreting himself to avoid his creditors, disposing of his property with intent to defraud his creditors and the like ; and the object was to secure an equal distribution of his property among creditors. As some compensation for compelling the debtor to give up all his property, the practice was early introduced of giving him a complete discharge from his debts. Thus bankruptcy was regarded as disgraceful, being in the nature of a punishment for some act, either wrong in itself or considered as contrary to good morals and strict integrity in trade, and something to be dreaded and avoided if possible.

On the other hand, insolvency applied to all persons, whether traders or not ; no act of bankruptcy was essential (it was rather a hindrance than a help) ; proceedings were instituted by the *debtor* against a creditor or creditors ; and the object mainly was, not to procure a discharge from his debts, but to exempt his body from imprisonment. Thus insolvent laws were intended to benefit the debtor. While they were more genera

than bankrupt laws in their application to persons, they were more limited in their operation in individual cases, effecting only a partial instead of a full discharge. Thus the law stood in England.

The Constitution of the United States provides that Congress shall have power to establish "uniform laws on the subject of bankruptcy throughout the United States." The bankrupt act of 1841 embraced the essential features of both the bankrupt and insolvent laws of England. A question was made whether that part of it which was essentially an insolvent law was within the constitutional power of Congress. The question arose in the Supreme Court of the State of New York, and was elaborately and with great ability discussed by COWEN, J., in favor of the constitutionality of the law, and by BRONSON, J., against it. NELSON, C. J., concurred with Judge COWEN. *Kunzler v. Kohaus*, 5 Hill, 417; *Sackett v. Andross*, id. 327. Subsequently the question was decided in the same way by Mr. Justin CATRON in *Klein's case*, 1 How. 277, and that is now regarded as the law of the land.

Since that time, so far as the law of this country is concerned, the distinction between bankrupt and insolvent laws has been practically obliterated. In regard, therefore, to the effect of congressional legislation upon State legislation, we are unable to perceive that it makes any difference whether the latter relates to voluntary or involuntary proceedings. In either case, if action by the State court contravenes the policy of the bankrupt act, such action is unauthorized and void. If it does not, and does not defeat or impair any right which the debtor or creditor has under the bankrupt act, we see no objection to its validity.

It may be suggested that involuntary proceedings under our State law may in some way interfere with the debtor's right to a discharge. There may be cases in which this suggestion would be entitled to great weight. If it should be made to appear that the operation of the State law would be to prevent the application of the debtor, or to prevent the payment of the requisite percentage in order to obtain a discharge, or if, the bankrupt court being open, the creditor resorts to the State court instead, thereby depriving the debtor of his discharge; in such cases we concede that the national law would be supreme. But in this case no such questions arise. This is a question between two creditors, and it nowhere appears that the debtor will be in any respect or to any extent prejudiced by the result. The corporation, though a party in the cause, makes no objection to this proceeding. The objection comes only from the attaching creditor, and he fails to show that the State law deprives him of any right or privilege secured to him by the United States law. The chief object of the latter, so far as creditors are concerned, is to give to each

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his proportional part of the assets of the debtor. *Mayer and others v. Hellman*, 91 U. S. 496. That is secured to him by giving effect to the State law. Our own law, therefore, does not contravene the policy of the bankrupt act, but is in harmony with it, and promotes, rather than defeats, the intention of Congress.

In *Hawkins' Appeal from Probate*, 84 Conn. 548, prominence is given to the fact that there was in that case a voluntary assignment, and the course of reasoning there adopted rests mainly upon that fact. But in *Shepardson's Appeal from Probate*, 36 Conn. 28, which was a compulsory process, the proceeding was sustained on the ground that it did not appear that the debtor owed debts exceeding \$300.

After a careful consideration of this whole subject we are satisfied that the decisions in this class of cases cannot rest upon any supposed difference between voluntary assignments and proceedings *in invitum*. Independent but not inconsistent reasons were given for sustaining voluntary assignments in *Hawkins' Appeal from Probate* and *Maltbie v. Hotchkiss* 38 Conn. 80; 9 Am. Rep. 364. Proceedings *in invitum* stand upon somewhat different grounds; nevertheless they must be sustained, if sustained at all, upon principles essentially the same; the *intention* of Congress in this as in all other acts must determine the scope and extent of the law. We are not disposed to adopt and follow the arbitrary principle that the exercise of power by Congress to any extent absolutely annuls and renders inoperative all State legislation irrespective of the intention of Congress.

The equal distribution of a bankrupt's property among his creditors is a leading and prominent feature of both national and State laws. It has now become a controlling principle in the laws relating to debtor and creditor. Upon the belief that it will be strictly applied and faithfully administered, in case of bankruptcy, the business of the country is carried on and credit given. The benefit of this principle cannot be denied to a creditor who is in no fault, without doing him injustice. It is a remedy upon which he relied in giving credit and to which he is fairly entitled. If that remedy is not to be found in the bankrupt act, it will not be presumed that Congress intended to take away the remedy provided by the State.

It is not pretended and was not claimed by the learned counsel for the appellant that the debtor was subject to proceedings in the bankrupt court at the instance of the appellee. There are two conclusive objections to such proceedings.

First. There has been no act of bankruptcy. That, as we have seen, is essential. In the 39th section of the bankrupt act, as amended by the

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act of June 22d, 1874, the acts of bankruptcy are carefully enumerated. Unless some act therein described can be shown, the appellee can have no remedy in the bankrupt court. If the appellant would oust the State court of its jurisdiction it is incumbent upon him to show affirmatively the existence of some such act. This he has not done.

Secondly : Even if an act of bankruptcy has been committed, no facts are stated which show that the appellee could have invoked the action of the District Court. By the same amended section it is provided that a person committing an act of bankruptcy " shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable ; provided that such petition is brought within six months after such act of bankruptcy has been committed."

Now it does not appear that the appellee constitutes one-fourth in number of the creditors, nor that enough are ready to join with him to make one-fourth ; nor does it appear that his debt provable under the act amounts to one-third of the debts so provable ; nor does it appear that the petition could have been brought, after there was occasion for doing so, within sixth months after the act of bankruptcy. We cannot presume that any of these jurisdictional facts exist, and none are proved to exist. Congress having thus limited and restricted the operation of the bankrupt act, leaving, as is obvious, a vast number of cases to which it cannot possibly apply, it will not be presumed that it was thereby intended to leave creditors in such cases entirely without remedy, as must be the case if the State law is inoperative.

There are conflicting decisions upon this general subject ; but as most of the cases relate to voluntary assignments, and none of them are exactly in point, we deem it unnecessary to refer to them.

We advise the Superior Court to affirm the decree of the court of probate.

In this opinion PARDEE and LOOMIS, JJ., concurred, the latter with hesitation ; PARK, C. J., and FOSTER, J., dissented.

State v. Ward.

STATE V. WARD.

(43 Conn. 489.)

Burglary — breaking out.

A person in the night season entered a dwelling-house, without breaking, for the purpose of committing a felony, but broke out in making his escape. *Held*, to be burglary at common law. (See note, p. 669.)

INDICTMENT for burglary. The opinion states the case.

A. F. Eggleston, in support of the motion. 1. The breaking out of the house was not felony at common law. Sir Matthew Hale says in his Pleas of the Crown, p. 554: "If a man enters, in the night time, by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary, for *fregit et exivit, non fregit et intravit*." And Coke says a burglar is "he that by night *breaketh and entereth* into a mansion house with intent to commit a felony."

2. But the attorney for the State relies upon the English statute of 12 Anne, as having become a part of the common law of this State. That statute provides that "if any person shall enter into the dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or, being in such house, shall commit any felony, and shall, in the night time, break the said house to get out of the same, such person is, and shall be adjudged and taken to be, guilty of burglary." The preamble to that act is as follows: "Whereas there has been some doubt whether the entering into the mansion house of another, without breaking the same, with an intent to commit some felony, and breaking the said house in the night time to get out, be burglary, be it declared and enacted, etc. This act was passed after Sir Matthew Hale had expressed the opinion we have quoted, and in view of the prevailing opinion to the same effect as to the common law upon the point in question, and must be regarded as an original enactment setting aside the common law and not declaratory of it.

3. This statute has never become a part of the common law of this State. No authority holds that an English statute, passed subsequently to the emigration of our ancestors, constitutes a part of the common law of this country. It must have been passed before. 1 Kent's Com. 473. The Colony of Connecticut dates from 1635. It received its charter in

1662. The statute 12 Anne was enacted in 1718. At the head of the statute book of the Colony of Connecticut, from 1650 to 1784, appears the following significant law: "Be it enacted by the Governor, Council, and Representatives in General Court assembled, that no man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, * * * unless it be by virtue or equity of some *express law of this Colony*, warranting the same, established by the General Court, and sufficiently published; or in case of the defect of such law, in any particular case, by some clear and plain rule warranted by the word of God." This colonial enactment precedes the statute of 12 Anne by sixty-three years. But the common law of England, *as such*, has never had any force in the State of Connecticut, much less any English *penal* statute, enacted seventy-eight years after our existence as a colony. *Fitch v. Brainerd*, 2 Day, 189. The New York and Massachusetts decisions are of no assistance in the discussion of this matter, because in the Massachusetts colony the common law of England was accepted and put in practice in all the courts in that province by special commission of the King; and since then the English common law, so far as applicable to our situation and government, has been recognized and adopted as one entire system by the Constitutions of those States. 1 Kent's Com. 472. Notwithstanding all this, the State of New York has deemed it prudent to place upon its statute book substantially the statute of 12 Anne, apparently "being in some doubt" as to its being a part of their common law. Connecticut has never assumed, in its courts of justice, or declared by statute, that 12 Anne is the law of this State. The only adoption of English statutes by the courts of this State has been that of ancient statutes, *not penal*, whose corrective and equitable principles had become so interwoven with the common law as to be scarcely distinguishable therefrom. *Strong's case*, Kirby, 345; *Fitch v. Brainerd*, 2 Day, 189.

W. Hamersley, State's attorney, contra. 1. The statute 12 Anne is declaratory of the common law. 1 Russell on Crimes, 792. It is so expressed by the act itself. The whole reason of the thing is in favor of the view that makes a breaking out burglary as much as a breaking in. Burglary is not an offense against property. It is an offense against security. The attempt to commit a felony becomes an actual felony by reason of the violation of the security of the dwelling-house by night. The security of the house is just as much violated by a breaking at the time of the exit as at the time of the entry. The felonious intent accompanies the burglar throughout his

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attempt. The attempt is one act from the entry to the exit. It is immaterial at what stage of the act the violence is committed, whether at the entry, after the entry and before the exit, or at the exit. Or rather, the attempt being one act, it is not divisible for any such purpose; a breaking during the attempt affects the whole act. This view of the law of burglary has been adopted by the American text-books without exception, and has not been questioned in any reported decision. 2 Swift's Dig. 331; 2 Bennett & Heard's Lead. Cas. 62; 2 Bishop's Crim. Law, §§ 84, 86; 3 Greenl. Ev., § 76; *Sand's case*, 6 Rogers' City Hall Recorder, 1.

2. The common law of England, so far as the same was consistent with the local circumstances of the colony, was the common law of Connecticut at the time of its settlement, and so remains unless altered by legislation. All English statutes modifying this common law, passed prior to our settlement, were operative here as a part of our common law. 1 Bishop's Crim. Law, § 13; *Commonwealth v. Leach*, 1 Mass. 61. English statutes passed since the settlement of the colony and before the revolution, modifying the common law then prevailing in the colony, may also be operative now as part of our common law. Their operation depends upon the question whether they were adopted or acquiesced in during the colonial stage. 1 Bishop's Crim. Law, § 12. For such adoption no legislative action is required. And it is not necessary to show affirmatively that the rule has been received in some judicial proceeding. *Commonwealth v. Chapman*, 13 Metc. 72. A beneficial statute, in amendment of the common law, may be presumed to have been adopted here. *Sackett v. Sackett*, 8 Pick. 316; *Boynston v. Rees*, 9 id. 581; *Commonwealth v. Chapman*, 13 Metc. 73. In Connecticut the inhabitants, by virtue of the charter of Charles II, were entitled to the liberties and immunities of English subjects the same as if born in England, and the colonial legislature was forbidden to enact laws contrary to the laws and statutes of England. Our courts have held that a statute of Anne, in amendment of the common law, qualifies that law as existing in Connecticut, though no case arose under the statute until after the revolution. *Strong's case*, Kirby, 345.

FOSTER, J. Upon the trial of this case to the jury the public prosecutor offered evidence to prove, and claimed that it did prove, that the defendant entered the house of one Gantz in the night season, through a window in the second story, about fifteen feet from the ground, which window was raised about six inches and supported in this position by an oil-can, with an intent to steal the goods of one Davis then in the room;

and that he unlocked the door of Davis' room and the outer door of the house, for the purpose of making his escape therefrom. The attorney for the State asked the court to charge the jury, as matter of law, that if they found the above facts proved, beyond a reasonable doubt, they would support a verdict of guilty of the charge contained in the information. The court so instructed the jury, and they returned a verdict of guilty. The motion for a new trial raises the question, was this instruction correct?

We think it was. If each and every of the acts constituting a crime are committed, and all the evils consequent on the crime are produced, the precise order in which the acts are done cannot be material. Now burglary is the breaking and entering the house of another in the night season with an intent to commit a felony. The jury have found that, coupled with the guilty intent, the accused committed every act going to make up this crime. The accused stood not on the doing of these acts, nor on the order of doing them, except so far forth as was convenient and necessary to accomplish his guilty purpose. That this offense is burglary we can have no doubt.

It is true that doubts have been expressed whether a breaking, for the purpose of escape, constituted burglary. Lord HALE and Chief-Justice TREVOR expressed such doubts on the trial of Elizabeth Clark at the Old Bailey in 1707. The offense was punishable with death, and it was creditable to the hearts of judges to make fine distinctions and insist on technicalities in favor of human life, especially when the offender was a woman. The law, however, was then generally considered well settled, and so the statute of 12 Anne was soon after passed as a declaratory act. After stating the law to have been doubted, it was "declared and enacted, that if any person shall enter into the mansion or dwelling-house of another, by day or by night, without breaking the same, with an intent to commit felony ; or, being in such house shall commit any felony, and shall, in the night time, break the said house to get out of the same, such person is and shall be adjudged to be guilty of burglary, and shall be ousted of the benefit of clergy in the same manner as if such person had broke and entered the said house in the night time with an intent to commit burglary there." Stat. 12 Anne, ch. 7.

We incline to the opinion that the facts found to have been committed by the accused constituted the crime of burglary at common law, and that the statute of Anne, above quoted, should be regarded simply as declaratory of that law.

If the statute be viewed in another aspect, as in alteration and amendment of the common law, it may still perhaps be considered a part of

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our law by adoption, though not of binding force as a statute. Statutes of this character, passed by Parliament before our declaration of independence, have been adopted by our sister States as part of their common law. *Commonwealth v. Leach*, 1 Mass. 59; *Commonwealth v. Knowlton*, 2 id. 584; *Pemble v. Clifford*, 2 McCord, 81; *Sackett v. Sackett*, 8 Pick. 809; *Boynton v. Reas*, 9 id. 528; *Commonwealth v. Chapman*, 18 Metc. 68. In this State, in 1787, our Superior Court recognized and adopted the statute of 9 Anne, altering and amending the common law relating to writs of mandamus. *Strong's case*, Kirby, 845.

We are satisfied with the charge of the court, and advise no new trial.

In this opinion the other judges concurred, except PARDEE, J., who, having tried the case in the court below, did not sit.

NOTE.—In *State v. McPherson*, 16 Am. Rep. 769; S. C., 70 N. C. 289, it was held that in order to convict one on evidence of "breaking out" it is necessary to charge that he did "break out" and not that he broke in. The statute of 7 and 8 Geo. IV. provided "If any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit felony, and shall in either case *break out* of the said dwelling-house, such person shall be deemed guilty of burglary." Under this statute it was charged that the defendant, besides committing the other wrongful acts, did "break to get out of the said dwelling-house." It was held to be insufficient. *Rea v. Compton*, 7 Carr. & P. 189.—REP.

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(43 Conn. 514.)

Insanity — when partial insanity will reduce the degree of crime — moral mania.

A person was indicted for murder in the first degree and convicted, notwithstanding there was some evidence tending to prove his insanity. Upon a petition for a new trial on the ground of newly-discovered evidence, tending further to establish insanity, *held*, that a new trial should be granted, and that even if the proof should not establish a total want of responsibility by reason of insanity, yet if it showed that the prisoner's mind was so far impaired as to render him incapable of a deliberate, pre-meditated murder, he should be convicted only of murder in the second degree. The jury ought to consider moral mania, if satisfied of its existence, in determining the degree of crime and give it such weight as it is fairly entitled to under the circumstances.

PETITION for a new trial upon a conviction of murder in the first degree, upon the ground, among others, of newly-discovered evidence. The facts are sufficiently stated in the opinion of the court. Those por-

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tions of the opinion devoted to a consideration of the question of the power of the court to grant new trials are omitted.

L. N. Blydenburgh, R. S. Pickett, and J. Bishop, for petitioner.

T. E. Doolittle and L. M. Hubbard, for State.

CARPENTER, J. The charge was murder in the first degree. The homicide was admitted; the vital question being whether the prisoner was in a condition of mind to form a deliberate purpose to take life. The defense claimed that he was not, for the reason that he was insane; indeed, it was claimed that he was not criminally responsible at all. The inquiry, therefore, was not merely whether he was irresponsible, but assuming his responsibility, the question still remained, was his mind so far impaired as to raise the presumption that he could not form a willful, deliberate and premeditated purpose to take life?

The burden was on the State to show not only that the prisoner was capable of committing a crime, but that he was in a condition to plan and execute a cool, deliberate murder. The degree of malice essential to murder in the first degree, like the act of killing, or any other material fact, must be proved beyond a reasonable doubt, or the jury ought not to convict of the greater offense. Upon that point the jury might have entertained a reasonable doubt, and at the same time may have been satisfied that the act was a crime and that it was their duty to convict of murder in the second degree.

[The court here considered the question of the petitioner's negligence in discovering the new evidence and the objection that such evidence was cumulative.]

We do not care to state at length the testimony in the case. It seems that the prisoner notified his employers that he should give up his work, and they employed others to take his place. He then objected, saying he had not given it up, and insisted that Mr. Norton and Mr. Nettleton, who had been employed in his place, should not go to work. Being a poor man and having a family to support, he became very much excited and caused some trouble in the shop, for which he was arrested. This was on Thursday. His trial was to take place on Saturday. Saturday morning he armed himself with two revolvers, went to the shop, and commenced firing — some of the time with a revolver in each hand — and in a few moments he had shot at no less than four different persons. One of the men who took his job, Mr. Norton, was shot at and wounded; the other, Mr. Nettleton, although close by the prisoner, was not mo-

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tested. Some ten or twelve persons were present, and the affair occurred in broad day-light. Of course there was no attempt at concealment, and hardly a possibility of escape. If the prisoner reflected at all he must have known that detection and punishment were certain.

The motive for the crime seems to be wholly inadequate. His employers had only accepted his resignation, and the men employed in his stead had only offended in consenting to be employed. How a rational man could coolly and deliberately plan a murder of these parties, or of any one of them, as a remedy for any existing evil, is difficult to conceive. Revenge, the only other possible motive, rests upon a slight provocation.

The indiscriminate nature of the attack makes the whole matter still more mysterious and incomprehensible. The only man killed was one with whom he had had no trouble, and the testimony does not show that he owed him any grudge. This indicates not so much a deliberate intention to take the life of some one who had injured him, as a disposition to destroy life generally, it mattering little to him who the unfortunate ones might be. "In a case of homicide the relations existing between the parties are worthy of much consideration. If the person slain were a parent, a child, a wife, or some near friend or relative, and no particular cause for the act was assigned, it might raise a fair presumption that it was due to insane impulse. If the individual slain be an object merely of indifference, toward whom no peculiar feelings either of friendship or enmity can be presumed to be entertained, the presumption, although much less strong, is still in favor of its being an insane act. The mere motiveless destruction of life can with difficulty be regarded as the act of a sane mind. If, on the contrary, a motive exist, or if feelings of enmity, originating in no delusion, be entertained toward the person slain, the presumption will be that it is a sane act." Dean's Medical Jurisprudence, 577. We look in vain for any motive for taking Hall's life, and it is by no means clear that his death was caused by inadvertence, while attempting to take the lives of others.

As a fitting close to such a tragedy, the prisoner made two unsuccessful attempts to take his own life. It is strange that a professed Christian, as the prisoner was — one who believes in future rewards and punishments — should deliberately imbrue his hands in the blood of his fellow-man, and then rush unbidden into the presence of his Maker and Judge, to receive the punishment due to his crimes. In this age of the world suicide is regarded by many as conclusive evidence of insanity. Esquirol, a celebrated French physician, who founded a lunatic asylum in 1799, which became a model for all similar institutions afterward founded in

France, and who published a work on mental maladies, thinks that in all cases the suicidal act is the deed of a monomaniac, and results from a pathological change in the brain or some part of it. However this may be, it is probably true that homicidal mania manifests itself in self-destruction more frequently than in any other form.

In civil causes the act which is the occasion of investigating the mental condition of the actor is carefully considered. If it is a rational act, rationally done, it is strong evidence of a sound mind; if it is an irrational act, or done in an irrational manner, it is regarded as evidence of insanity. Making due allowance for temper and passion we see no good reason why the same rule should not prevail in criminal jurisprudence. If so, there is certainly to be gathered from this transaction some evidence of an unsound mind.

The testimony shows that the prisoner, to use the words of an expert who heard the trial, was a man of "irritable temperament, little self-control, a strange man, disappointed in business, out of work, with an increasing family and fear of poverty, and added to all that dyspepsia, and fever and ague." It also appears that he was subject to great nervous excitement, and at times to a corresponding despondency, was easily vexed and annoyed by his fellow-workmen, at one time imagining that they had poisoned the water that he drank, and that they had conspired against him for the reason that he was a superior workman and were endeavoring to deprive him of employment. In the events which immediately preceded the homicide he spoke of them as trying to kill him, and told his wife that he intended to use the pistols which she saw only in self-defense. His arrest also about that time, and being held for trial, for a breach of the peace, further excited him. It also appears that during the latter part of the year 1873, and the first part of the year 1874, he was greatly changed from what he formerly was, so much so that it was apparent from those who knew him and came in contact with him, being a subject of conversation with them. One man refused to employ him, although wanting a man in his line, because he regarded him as half crazy. Several others observing his singular conduct, and noticing the change that had come over him, also pronounced him crazy. It is also manifest that he was naturally of a quarrelsome disposition, and had a violent temper, which at times was ungovernable.

The State denied that there was in all this any indication of insanity; but accounted for it all by attributing it to bad temper, and peculiarity of temperament and disposition. Upon all the facts which were placed before the jury, giving a large part of his personal history for the last few years, Dr. Butler, the eminent physician who was for thirty years at

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the head of the Retreat for the Insane at Hartford, pronounced him insane. Drs. Jewett and Bacon of New Haven, two eminent physicians of large experience, pronounced him sane.

[The court then considered the new evidence offered and continued.]

It is not our purpose, nor is it our duty, to apply this evidence to any one of the numerous phases of insanity recognized by courts of justice. Indeed, it is not necessary for us to assume that it does or may, in the opinion of the jury, establish the fact that the prisoner is not criminally responsible for his acts. The evidence may fall far short of this, and still satisfy a jury that he ought not to suffer the penalty of the crime of which he was convicted.

Perhaps the most usual form of insanity which comes under the cognizance of courts of justice is derangement, total or partial, of the intellectual faculties. There is some evidence in this case indicating delusion, which is the usual, and perhaps an essential, manifestation of this form of insanity. Should the jury be satisfied of its existence they would probably acquit the prisoner upon that ground. As to the sufficiency or insufficiency of the evidence for that purpose we express no opinion.

Another form of insanity is a derangement of the moral faculties. In this there is usually, though not always, an entire absence of delusion. Moral mania, like intellectual, is of two kinds, partial and general. Instances of the former, are *cleptomania*, or propensity to steal, *pyromania*, or propensity to destroy by fire, and *homicidal mania*. General moral mania "consists in a general exaltation, perversion, or derangement of function, of all the affective or moral powers. Those who have observed and written upon this form of mental alienation, unite in describing those who labor under it as persons of singular, wayward and eccentric character. Their antipathies are violent, and suddenly taken; their suspicions unjust and severe, and their propensities strong and eagerly indulged. They are generally proud, conceited, ostentatious, easily excited, and obstinate in the maintaining of absurd opinions." Dean's Medical Jurisprudence, 496. On page 497 is a quotation from Hoffbauer, in which it is described as "a state in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former nor abstain from the latter. It does not follow that he may not be in possession of his senses, and even his usual intelligence; since, in order to resist the impulses of the passions, it is not sufficient that the reason should impart its counsels; we must have the necessary power to obey them. The maniac may judge correctly of his actions, without being in

a condition to repress his passions, and to abstain from the acts of violence to which they impel him."

The subject of moral mania will generally be found to have experienced a great change in temper, disposition and moral qualities, either sudden and dating from some reverse of fortune or loss of dear friends or relatives, or gradual and imperceptible, consisting in an exaltation or increase of peculiarities which were always natural or habitual. The moral maniac will rarely exhibit any signs of derangement in his conversation. He will often be regular, systematic and methodical in all his business transactions, and to all appearance regular in the use of his intellect. One man sees him in business transactions only, or converses with him when he is free from excitement, and he does not hesitate to pronounce him perfectly sane; another has an opportunity to witness some strange and unaccountable eccentricity of conduct, totally irreconcilable with the possession and exercise of a sound mind. The facts to which these two witnesses would testify are apparently contradictory; and yet they are perfectly consistent when the form of the malady is known. The *conversation* discloses intellectual mania, and the *conduct* moral mania. We will not undertake to say that the conduct above referred to as characterizing one who is afflicted with moral mania is exactly the conduct of the prisoner; but the description is certainly applicable to some extent, and when we consider that the manifestations of insanity are as various as characters and temperaments, that the insane man is not careful to walk in the footsteps of those who have gone before him, but wanders through moral or intellectual darkness, or both, and makes his own path, we are by no means clear that a jury might not with perfect propriety find that the prisoner is morally insane. Upon this point the newly-discovered evidence bears with peculiar force, and materially strengthens the evidence given upon the trial. It is true that courts have hitherto been slow to recognize this form of insanity as an excuse for crime; nevertheless that it exists, is well understood, and, in some cases, is clearly defined by medical and scientific men, cannot be denied.

It is not our purpose either to ignore or recognize this form of insanity as an excuse for crime. The question is not whether an act committed under its influence is criminal; whether the actor should be punished or be exempt from punishment; but whether he is a proper subject of capital punishment. If it be conceded that one afflicted with it never loses the power to distinguish between right and wrong, and is at all times master of himself and may control his actions, still his mind may be enfeebled and the power of his will weakened, so that he will readily

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yield to the influence of temptation or provocation without that willful, deliberate and premeditated malice which is essential to constitute murder in the first degree. The jury, therefore, ought to consider moral mania, if satisfied of its existence, in determining the degree of crime, and give it such weight as it is fairly entitled to under the circumstances.

There is another view which may, and we think should, be taken of this case. It cannot be denied that the prisoner is a man of an excitable temperament, a quarrelsome disposition, morbidly jealous and suspicious, imagining evils where none exist, or at least magnifying those which do exist, and when dyspepsia or fever and ague is upon him, or there is any other exciting cause, like business troubles, disappointments, etc., all these propensities are intensified and brought into greater activity. Such traits are the seeds which are likely to germinate and ultimately to result in confirmed insanity. Now, assuming that the disease had not yet reached that stage, but, on the contrary, that the prisoner could not only distinguish between right and wrong, but had also the power of self-control which would enable him to do the right and refrain from doing the wrong, is it not quite probable from this evidence that the prisoner was laboring under an unusual and unnatural excitement, brought upon him by the circumstances in which he was placed and the atmosphere which surrounded him, and that by reason thereof his mind was in such a state and condition that he was incapable of committing murder in the first degree? May it not be possible that the man's unfortunate temper, excited by what he regarded as repeated and successive provocations, held all his faculties, moral and intellectual, in subjection to some extent, so that he was incapable of reasoning correctly, or rightly apprehending his relations to others? And that, too, not only while he was under the direct and immediate influence of the exciting causes, but also after he had had time and opportunity for reflection, continuing even until after the commission of the homicide? The common law is considerate of those who take life in the heat of passion, but makes it a capital offense to take life after time enough has elapsed for the passions to cool, making no allowance for differences in temper and disposition. Under our statute, which divides murder into two degrees, there is ample opportunity to make some allowance for those cases where, from any cause, excitement and passion continue beyond the limits allowed by the common law, and impel to the commission of crimes which would not be committed in cooler moments. Reason and humanity require that this should be done. This may be, and we are inclined to think that it is, a case in which the jury would be justified in regarding the distinction just adverted to.

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Upon a careful consideration of all the evidence in the case, including the new evidence, it seems to us very doubtful whether the prisoner is a proper subject of capital punishment.

We, therefore, advise the Superior Court to grant a new trial.

In this opinion FOSTER and PARDEE, JJ., concurred; PARK, C. J., and LOOMIS, J., dissented as to the propriety of granting a new trial for newly-discovered evidence.

CASES
IN THE
S U P R E M E C O U R T
OF
CALIFORNIA.

PEOPLE v. LYNCH.

(51 Cal. 15.)

Assessment for local improvements — apportionment must be uniform — Power of legislature to validate.

In levying an assessment upon lots abutting upon a street in a city, for the purpose of improving such street, a lot within the district declared to be benefited was not assessed. *Held*, (1) that the whole assessment was void, and (2) that an act of the legislature validating such assessment was unconstitutional and void.

ACTION to recover an assessment for betterments for planking Tenth street in the city of Sacramento.

On the 12th of October, 1869, a petition was presented to the Board of Trustees of the city of Sacramento, signed by owners of lots fronting on Tenth street, between J and N, to have Tenth street, between said points, improved by grading and planking it. Sacramento lies on the east side of the river of that name, and the streets, commencing at the river, are numbered back east from one up to Tenth, Eleventh, etc. These streets run nearly north and south. The streets running east and west cross these at right angles, and are named by the letters of the alphabet, thus: A, B, C, D, etc. The Board of Trustees resolved to make the improvement; and having let the contract, the work was completed. The charter of the city required an assessment for such improvements to be levied on the lots fronting on each side of the street to the center thereof, according to the number of front feet. For improving a street, where two streets crossed each other, the assessment was to be levied upon the quarter blocks lying at each of the four corners, according

to the number of front feet of each on the street improved and on the cross street. M street, where it crossed Tenth street, was one hundred feet wide, and the quarter block at the northeast corner of M and Tenth streets was one hundred and sixty feet square, fronting one hundred and sixty feet on Tenth and one hundred and sixty feet on M street. The assessor, in making the assessment, left out the west one hundred and twenty feet front of said quarter block fronting one hundred and twenty feet on M street. The defendant, Lynch, owned the east half of lot four in the square bounded by M and N, and Ninth and Tenth streets, fronting one hundred and sixty feet on Tenth street, and it was assessed for \$644.98, which he failed to pay, and this action was brought to enforce a lien for the sum assessed. The municipal legislative body for the city of Sacramento was a board of trustees. The following is the fifty-second section of its charter :

“In the public streets already laid out by lawful authority, opened and graded within the limits of said city, or which shall hereafter be laid out, opened and graded, as provided in this act, the paving, planking, draining and repairs of every kind shall be assessed upon and done at the equal expense of the adjacent lots on each side of said streets, each separate owner being at liberty and being required under the direction of the street commissioner to do, or cause to be done, at his own expense, the work, repairs and improvements in front of his own premises to the center of the street. The expense of all such work, improvements and repairs upon each street-crossing, or the space formed by the junction of two or more streets, shall be assessed with equality upon each quarter block adjoining and cornering on the same, each distinct lot or parcel of lot included in such quarter being separately assessed for its equal proportion. For that purpose, all the blocks shall be considered as divided into quarters by straight lines through the center of them, and running parallel with each of the streets bounded by said blocks. In cases where the blocks are of irregular shape and not bounded by parallel streets, so that they cannot be equally divided in that manner, the expense of constructing and repairing crossings, or that portion of them adjacent to such irregular-shaped blocks, shall be assessed as aforesaid with equality upon the lots in the whole block. The space formed by the junction of two streets terminating at the same point, if such a case should occur, shall be planked, paved, and kept in repair at the equal expense of the lots fronting thereon, and the contiguous quarter blocks.”

The court below held that the assessment was void, but also held that it was validated by the act of March 30, 1874, referred to in the opinion, and enforced the lien. The defendants appealed.

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Armstrong & Hinkson, for appellants, argued that the assessment was void because the legislature had no power to make an assessment itself, and, therefore, could not validate a void one; and cited *Taylor v. Palmer*, 31 Cal. 249; *Baltimore v. Horn*, 26 Md. 194; *Baltimore v. Porter*, 13 id. 284; *Dillon on Municipal Corporations*, §§ 15, 46.

They also argued that the assessment was void because a portion of the lots were left out; and cited *People v. Goldtree*, 44 Cal. 324; *Cooley on Const. Lim.* 382; *Washington Avenue*, 69 Penn. St. 362; S. C., 8 Am. Rep. 255; *Rutherford's Case*, 72 Penn. St. 85; S. C., 13 Am. Rep. 655; *Palairot's Appeal*, 67 Penn. St. 479—486; S. C., 5 Am. Rep. 450; *McDaniel v. Correll*, 19 Ill. 228; *Griffin v. Cunningham*, 20 Gratt. 81, 107; *Eddy v. The People*, 15 Ill. 386.

C. T. Jones and *Matt. F. Johnson* and *Ed. M. Martin*, for respondent, argued that the legislature had power to pass the curative act, because it could cure any irregularity in the performance of an act which it could authorize to be done, and that the legislature had power to authorize an assessment to be levied, and, therefore, could validate an irregular assessment; and cited *San Francisco v. Canavan*, 42 Cal. 542; *People v. Holladay*, 25 id. 800; *Wallace v. Moody*, 26 id. 387; *Dentzel v. Waldie*, 30 id. 138; *San Francisco v. Canavan*, 42 id. 558; *Thompson v. Lee County*, 3 Wall. 331; *McMillen v. County Judge and Treasurer of Lee County*, 6 Iowa, 391; *Watson v. Mercer*, 8 Peters, 108.

McKINSTRY, J. The action is on an alleged assessment for planking Tenth street, from J to N streets, in the city of Sacramento.

As conclusions of law, the court below found that the order of the board of trustees, directing the grading and planking, was *void*, because the board did not acquire jurisdiction to make it; that the contract for planking was also void, and that the assessment was void, because the same was not made in pursuance of the city charter. The court further found that all the proceedings had been *legalized* by the act of the legislature, approved March 30, 1874, "to legalize the assessment of a street tax in the city of Sacramento," the first section of which reads:

"The assessment upon all lots fronting on Tenth street, between J and N streets, in the city of Sacramento, levied on the 20th day of December, 1869, for the purpose of planking Tenth street, between J and N streets, is hereby made legal and valid, and all acts of the board of trustees of said city in relation thereto shall have full force and effect, and said tax so levied upon said lots shall be a lien thereon until paid."

For the purposes of the present case, I am willing to admit the entire

accuracy of the rule, said by Cooley to be applicable to statutes passed to cure irregularities in the assessment of property for taxation: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity of which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Const. Lim. 871.

Passing the questions made below as to the *identity* of the assessment which the act attempted to validate, the District Court erred in holding that the act legalized the illegal proceedings. And this for three reasons:

1. The assessment which it attempted to legalize was entirely wanting in the elements of equality and uniformity, according to any standard or system of apportionment, and, therefore, could not have been directly levied by the legislature.

2. In California, the power of "assessment" — distinguished from that of taxation as ordinarily employed — cannot be directly exercised by the legislature, within the limits of an incorporated city.

3. The inhabitants of a city cannot be deprived of their right to have such matters as are placed by the charter under the supervision and control of the legislative department of the city government, passed upon by their representatives in the city council. The legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements.

I. As I understand it, the court below distinctly found that a lot of land, within the district declared by the charter and law to be benefited by the alleged improvement, was not assessed at all. Assuming that the act (in connection with the charter and attempted assessment) is to be read as if it, in terms, declared that a public work had been done, which was of benefit to the same property which would have benefited if the work had been regularly ordered, it assesses all the lots within the district benefited, except certain lots which it releases from liability for the benefit received.

An "assessment" for a local improvement is a *tax*, differing from other taxes in that it need not be levied upon the *ad valorem* principle. Although such assessment is not prohibited by that clause of the State Constitution which provides that "all property shall be taxed in proportion to its value," it is of the very essence of taxation, in *every form*, that it be levied with equality and uniformity; and to this end, that there should be some system of apportionment. *Taylor v. Palmer*, 81 Cal. 241. These assessments may be apportioned by reference to the num-

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ber of feet fronting on the improvement, or to any other standard which will approximate exact equality and uniformity ; but whatever the basis of taxation, the requirement that it shall be uniform is universal, the difference being only in the character of the uniformity. The terms "tax" and "assessment," except in the case of specific taxation, both include the idea of some ratio or rule of apportionment ; so that, of the whole sum to be raised, the part paid by one piece of property shall have some known relation to, or be affected by, that paid by another. *Woodbridge v. Detroit*, 8 Mich. 301 ; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419.

Abstractedly, the idea of taxation involves the distribution of the burden, with equality and uniformity, upon *all* the property throughout the State, or district. But it was said in *Merrit v. Farris* : "The Constitution, in its application to the various departments of the Government, and to individual rights, must receive such a construction as to give it a practical operation." 22 Ill. 311. And, in the same case : "The framers of the Constitution could not have designed that such omission (to assess an individual, or particular property) should avoid the tax levied on the property which is regularly assessed. *They intended to require, and did require that the law should provide for a uniform mode of assessment and collection, which would not sanction exemption from the burden of taxation*, and they imposed the duty upon the officers acting under the revenue laws, of executing them fairly and impartially ; but it never could have been intended that their omissions should render the whole tax void, and suspend the collection of revenue. If an officer willfully and corruptly, or from gross negligence, were to make such omissions, he would doubtless be liable in damages to those suffering injury," p. 312. And it was there held, that the omission of the district clerks to place on the tax-roll the names of certain property-holders within a school district, did not vitiate the whole tax.

Elsewhere — and the difference seems to be recognized by the weight of authority in other States — a distinction is made between mistakes of fact, erroneous computations or errors of judgment, by those to whom the execution of the taxing laws is intrusted, and the *intentional disregard* of such laws in such manner as to impose illegal taxes on those who are assessed. In *Weeks v. Milwaukee*, 10 Wis. 242, PAINE, J., speaking for the court, after declaring a rule based on the foregoing distinction, and that where mere mistakes occur on the part of officers who are endeavoring, in good faith, to discharge their duties, they ought not to invalidate the whole levy, adds : "It seems to me, the other part of the rule is equally essential for the protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax

upon a part only of those liable to pay it, and have still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those who, by being appointed to execute the laws, would seem thereby to be placed beyond legal control. I know of no considerations of public policy or necessity that can justify carrying the rule to that extent."

In the present case (whatever may be the rule as to executive officers, such as assessors charged with duties ministerial in their character), it is unnecessary to go further than this: The constitutional limitation, that taxation shall be equal and uniform, including the proposition, that by the law levying it it shall be a burden on all property similarly affected, or in the same relation to the purpose of the tax and to the taxing-power, applies with full force to the action of the legislature. While, therefore, if a law shall provide for a tax in conformity to the Constitution, errors in judgment on the part of the agents appointed to assess (or even intentional omissions) may not invalidate the whole levy, an attempt by the legislature to release certain of the property from its proportion of the tax would be of none effect.

In *Crosby v. Lyon*, 37 Cal. 243, where the tax had actually been assessed and collected of the company, it was held that a statute providing for a return to a railroad company of its part of a school tax lawfully levied within a county was in contravention of the section of the Constitution which declares that taxation "shall be equal and uniform," etc. And in *People v. McCreery*, 34 Cal. 432, this court decided that the legislature had no power to exempt from taxation any private property in this State. In that case the judgment did not invalidate the entire levy, because, as was held in effect, the attempted exemption only was void, and the assessors were authorized to assess the property which the statutes pretended to exempt; and, although it was the duty of the assessor to assess all the property in his district, his omission to assess part, under the circumstances, did not render his whole action void.

But the act of March 30, 1874, contains no provision for a future assessment by any officer or agent of the State, of the property within the district declared by the legislative recognition of the proceedings under the charter to have been benefited by the improvement of Tenth street, or of the lots omitted in the attempted assessment which it was the object of the act to validate. The act, if it be retroactive at all, must be the same as if it had declared certain tracts of land to have been benefited by the local improvement, and had further enacted that parts of the tracts should pay the whole cost. It has been repeatedly held, that an attempt by the legislature to compel each lot upon a street to pay the whole expense of grading and paving along its front cannot be main-

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tained, because, while there is an apparent uniformity, the measure of equality required by the Constitution is entirely wanting. 9 Dana, 518; 8 Mich 274. It is far more clearly a violation of the constitutional principle of equality and uniformity to require of one lot, or any number less than all, to pay for all within an assessment district.

In the case at bar, the assessment, such as it was, was completed prior to the curative act, so called. The legislature attempted to ratify that very assessment, with all its imperfections on its head, including the defect, that part of the property within the assessment district had not been charged at all. This cannot fairly be treated as a law providing for the levy of an assessment within a certain district, and appointing officers to make it, whose errors, perhaps, might not vitiate the entire levy. This act, at best, is an attempt directly to levy a contribution within a certain district; to declare that each lot named shall pay a sum, arbitrarily fixed, as its portion thereof, and that particular lots shall pay nothing. Such a statute, if prospective, would undoubtedly be invalid, as clearly a violation of principles recognized and established by the Constitution of the State.

II. The power of "assessment" cannot be directly employed by the legislature within the limits of an incorporated city.

In *Taylor v. Palmer*, 31 Cal. 252, it was said: "It is true that the power of assessment is vested in the legislature, but it is so in a modified sense. It is not so vested as an independent or principal power, like that of taxation, but as a part of and as an incident to the power of organizing municipal corporations, and providing for them a system of government, to the proper working of which the power of assessment is indispensable. It was not intended that the power of assessment should be exercised by the legislature, and it never can be, except through the intervention of a municipal corporation; for, whenever the legislature undertakes to exercise the taxing power directly, it works under the power of taxation as distinguished from that of assessment."

And again: "It results that the legislature not only may grant, but must grant to one of its creatures a power which it is not permitted to exercise in its own capacity; or, to observe greater exactness, the privilege of exercising the power of taxation for certain purposes in a mode in which the legislature is forbidden to exercise it." (p. 258.)

The foregoing language is to be construed with reference to the facts of the case then before the court. The learned judge who delivered the opinion in *Taylor v. Palmer* was discussing the power of "assessment" within a city, and the conclusion was, that within corporations strictly municipal, the power cannot be directly exercised by the

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legislature. Thus construed, the case of *Taylor v. Palmer* accords with the subsequent ruling in *Hagar v. Supervisors of Yolo*, 47 Cal. 234, where it was held that, outside of such municipalities, the legislature might authorize the employment of the power by local boards.

This power of "assessment" is only mentioned in the Constitution in that section which provides for the organization of cities and incorporated villages. Art. IV, § 37. It is spoken of as a power of municipal government, familiarly known and well understood, both by the framers of the Constitution and by the people at large; and the legislature is commanded to restrict the power "so as to prevent abuses in assessments." It is a power which, from its very nature, can only be prudently employed by those in whom it is exclusively vested. Bearing this in mind, the language of the section above referred to, which provides for the prevention of abuses by legislative restrictions, would seem fully to justify the conclusion reached by this court in *Taylor v. Palmer*, that the power of assessment can only be exercised through the medium of the corporate authorities.

Conceding, therefore, the principle bearing upon retrospective laws to be as claimed by respondents, the legislature could not originally have levied the assessment which they attempted to validate by subsequent acts.

III. The legislature cannot deprive the city council, or other legislative body, of all discretion with respect to a local improvement within the limits of a city, when by the charter the matter of such improvements is confided to the judgment and discretion of the local body.

First. Before proceeding to the consideration of this last point, I propose to indicate what I conceive to be an erroneous view in respect to the exercise by the courts of the power of declaring statutes in conflict with the State Constitution.

It is often assumed, and sometimes asserted, that it is the duty of the judges to sustain, by strained interpretation, a law, which at first view is in apparent derogation of that instrument. I concede that a court should hesitate to declare a law unconstitutional, as it should render any decision involving important consequences only after due deliberation. But on the other hand, the judges may not indulge an indisposition to assume responsibility by falling back upon phrases used by jurists, however distinguished, which, fairly construed, mean only that great caution is to be employed in this as in other judicial actions.

Since the case of *Sharpless v. The Mayor, etc.*, 9 Harris, 147, perhaps no argument has been made in favor of the constitutionality of

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a statute in which the language of the chief justice of Pennsylvania has not been quoted: "We can declare an act of the assembly void, only when it violates the Constitution clearly, plainly, *and in such manner as to leave no doubt or hesitation in our minds.*" Yet it is manifest that the accumulation of adverbs and clauses, while it may give euphony to the sentence, adds no force to the meaning, which remains the same as if the able judge and brilliant writer had said that a court must be clearly satisfied that a law is unconstitutional before it can declare it to be so.

He certainly did not mean that a statute should be upheld whenever a doubt could be suggested that it might be constitutional; for this would be an abdication of the judicial function of determining the validity or invalidity of statutes on that ground. The courts cannot shirk the responsibility of deciding such questions, when presented. It is as much their duty to consider the Constitution, in ascertaining what is the law, as to consider the statute. This duty must be performed, whatever the consequences.

"The judicial department is the proper power in the Government to determine whether a statute be or be not constitutional. The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into and regard it as a paramount law.

"The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the Government to guard and enforce them." 1 Kent's Com. 449.

However apt the expression, "beyond all reasonable doubt," when referred to the action of a jury upon an issue of fact in a criminal case, the words have no peculiarly appropriate application to the action of a court upon any issue of law; since, in theory, every adjudication is made after full consideration of all doubts of its correctness.

Nor is it true that we can never hold a law void, unless we can find in the Constitution some specific inhibition which, in precise language, refers to the particular law. Human ingenuity would fall short of anticipating every possible *mode* by which might be consummated an abuse of legislative power, which the people, in constitutional convention, desired to guard against. The providence of constitution-makers

must find expression in broader terms ; but whether restrictions on the legislative power be declared as general and affirmative propositions, or appear as necessary inferences from a comparison of different portions of the Constitution, it is equally the province of the courts to determine whether a particular law falls within any of them. It is not for the judiciary primarily to inquire whether the legislature has violated the *genius* of the government, or the principles of liberty, or rights of man, or whether its acts are expedient, but only whether it has transcended its powers. Dwarris on Statutes, 269. It does not result, however, that in every case the courts, before they can set aside a law as invalid must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Cooley's Const. Lim. 171.

Under our Constitution the senate and assembly can perform any legislative act not prohibited, not because there is any magic in these names which absorbs all power not specifically conferred on the other departments of government, but because the Constitution places the legislative power in the senate and assembly in general terms. By the tenth amendment of the Constitution of the United States, it is provided : "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." The Government of the United States can exercise only such powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the States respectively retain such powers as have neither been granted, expressly or by implication, to the Government of the United States, nor conferred on the States governments.

It is by no means a corollary from the foregoing proposition, however, that *one department* of the State government may employ all the powers not granted to the Federal government. It is undoubtedly true, in a certain sense, that the State Constitution is to be construed as a *limitation* upon and not as a grant of legislative power ; that is to say, the general power of making laws having been placed by the people in the legislature, the legislature will be held to have power to make any law which it is not prohibited from making by the Constitution of the State or of the United States. In this respect the rule of interpretation is the reverse of that applicable to acts of Congress under the Constitution of the United States. But the "sovereignty of the people" is more than a meaningless phrase.

The people of California created the State government, and it was for this people to place (in the State Constitution) as many checks

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upon, and conditions and limitations of the general grant of legislative, executive or judicial power as they deemed proper or expedient. "The people of the State alone possess and can exercise supreme and absolute authority; the legislature, and the other departments of government, are but the depositaries of delegated powers more or less limited"—according to the terms of the Constitution. 1 Sharswood's Black Com., ch. 2, note.

The Constitution of California is more than a collection of suggestions or "directory" clauses as to the employment of the powers of legislation by a body which—like the Parliament of Great Britain—is omnipotent. It purports to contain, and does provide, an entire framework of government. It divides the powers of this government into three departments, no one of which is freed of the restrictions declared or necessarily implied from the instrument as a whole. We are to ascertain the meaning of the Constitution by an examination of all of it; and in making such examination, effect is to be given, if possible, to every section and clause. It is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. Cooley's Const. Lim. 58. The real question in the construction of the Constitution, as in the construction of a statute or of a contract, is: What is meant by the language employed? We should read it with a view to finding out the *thoughts intended to be expressed*. *Twitchell v. Blodgett*, 13 Mich. 188. In interpreting separate clauses we must presume that words have been used in their ordinary sense. *Gibbons v. Ogden*, 9 Wheat. 188. But we should see if the meaning of any one clause is qualified or illustrated by other clauses. If words are used which are employed in a certain sense in the constitutions or statutes of other States adopted or enacted prior to our own, it is proper to consider them as employed in the same sense in our Constitution, unless the context indicates that they were intended to convey a different idea. *Taylor v. Palmer*, 31 Cal. 240; *Ex parte Wall*, 48 id. 279; S. C., 17 Am Rep. 425. When the intent is not perfectly obvious from the language, we may regard the evil intended to be prevented, if discoverable in the history of legislation in this and other States; in short, if a law is to be tested by the Constitution, "it is the duty of the court to make such a decision as accords with its carefully formed and settled conviction, after using all accessible means of enlightenment." *People v. Blodgett*, *supra*.

Second. Bearing in mind the principles of construction above mentioned, I proceed to inquire: What did the framers of our Constitution mean, when, after declaring in general terms that the law-making

power should be vested in the senate and assembly, and requiring the establishment of a system of county and town governments, they further provided :

“It shall be the duty of the legislature to provide for the organisation of cities and incorporated villages, and to restrain their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations.” Art. IV, § 37.

“Each county, town, city and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe.” Art. XI, § 9.

Had the Constitution of California been silent in respect to cities and incorporated villages, the legislature would have possessed the power to create them ; but it would perhaps have been more difficult to say whether the people could not have been deprived of these local governments. So impressed, however, were the framers of that instrument with the propriety and necessity of such legislation, that they inserted the sections above quoted. What did they have in their minds when they spoke of cities and villages? It needed but to recall their origin and history to impress the Constitutional Convention with a conviction that municipalities are invaluable to a great and free people. The enlightened genius of the Roman civilization was planted and fostered by the establishment of colonies with urban privileges. In the Dark Ages the chartered towns in Europe served to curb the turbulence of the more potent of the crown vassals, and to erect barriers for the protection of personal rights against the rude force of the feudal barons. It often happened that from such centers of self-government the spirit of freedom was extended and expanded, and it may safely be said of the English boroughs—for example—that they were largely instrumental in developing the constitution of government which made that people jealous of the liberty they possessed, and capable of receiving still greater accessions of the same blessing. In our own country the existence of local political corporations began with the earlier settlement of the colonies. The benefits of such subordinate communities as schools of preparation for the discharge by the citizen of the duties he owes to his country at large, have been highly estimated by philosophical writers who have given their attention to the subject,—the distinguished author of *La Democratie en Amerique* considering the New England “towns”—which are like cities in so far as they possess certain powers of government—as the very life of American liberty. The advantage of having the home work done at home commends itself

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to every mind. The extreme inconvenience, to say the least, of an interference on the part of the State, by *special legislation*, with the innumerable details of administration in every locality, especially in the more densely populated portions of our territory, is manifest to all practical men. If there is danger in a city that the indifference of the more honest and intelligent may suffer the corrupt to seize and abuse the local authority, this risk equally exists with reference to the State or National Government. To a certain extent the danger that people may neglect their public duties exists everywhere, and can only be guarded against by greater diligence; it is an incident to our form of government—the price which we pay for our inestimable freedom. Assuming that a people of a municipality are fit to govern themselves, no one can hesitate to believe that any possible contingent evils of municipal government are more than compensated by the direct representation in the local councils of those peculiarly, and often exclusively, interested in the conduct of the municipal affairs. It was, amongst other things, to do away with frequent interference by the central power with matters of purely local concern, that cities and incorporated villages had been created in every State of the Union.

All these considerations may be supposed to have been present to the minds of the members of the Constitutional Convention. When they required that the legislature should organize cities and villages, they were doubtless actuated by a sense of the vast consequences of such corporations, entering, as they do, into the foundation of our political economy.

A system of territorial subdivisions and municipal organizations existed in California when our Constitution was adopted. But a very large majority of the inhabitants of California, as well as of the members of the convention, were recent immigrants from States where the common law prevailed as the basis of jurisprudence, and it was to the cities and villages there in operation that reference was made in the clauses of the Constitution. The convention used the terms as they had been employed throughout the United States, when employed at all; and the very idea of an American city involves the notion of a local government; of local officers selected by the inhabitants, and reflecting the wants and wishes of the inhabitants; and that these officers should exercise their own judgment in respect to the internal affairs committed to their charge by the law of their creation. The legislature can alter or repeal a city charter, but it does not follow that the legislature can deprive the aldermen, councilmen, supervisors or trustees of a city of all discretion in the discharge of their functions as such.

In *Ex parte Wall, supra*, we hold that the words “system of county

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and town governments" referred to county and town governments in their general features, like those of the State where county and town governments had been established. It is equally plain that the "cities and incorporated villages" required to be created by our Constitution, are cities and incorporated villages with *franchises* similar to those enjoyed by municipal corporations in other States. From the very nature of such corporations, and from what has already been said as to the intent of the Constitution that the legislative body of a city shall exercise choice and judgment with reference to expediency of action in matters appropriately confided to their care, it would seem to follow the legislature has no reserved power to set aside such choice or judgment, or to supersede the employment thereof in a particular instance.

As is said by Chief Justice CAMPBELL, in *People v. Hurlburt*, 24 Mich. 87; S. C., 9 Am. Rep. 103, "We must never forget, in studying the terms of the Constitution, that most of them had a settled meaning before its adoption. Instead of its being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing with known elements and functions. They were not towns, or counties, or villages, in the abstract, or municipalities which had lost all their old liberties by central usurpation, but American cities," etc. In the same case Mr. Justice COOLEY — than whom no more distinguished expounder of constitutional law is recognized in this country — said: "We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which are within the contemplation of the people, when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are, nevertheless, equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations. The circumstances from which these implications arise are: First that the Constitution has been adopted in view of

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a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from and be dependent on that system." (97-8.)

The State legislature may perhaps provide for an inquiry, in the first instance, into the propriety and feasibility of a project affecting exclusively the interests of the people of a city by persons or officers other than the members of the local legislature. There may be no serious objection to this, provided the action of such persons is merely advisory. But the definite and ultimate determination, which shall conclude the tax payers of a city, must be that of the appropriate local legislature. This question was fully considered in *The People v. The Common Council of Detroit*, 28 Mich. 228; S. C., 15 Am. Rep. 202. The legislature of Michigan had passed an act appointing a board, who by the terms of the law had absolute power to purchase lands for a park in the city of Detroit, and on whose report the common council were commanded to make provision to pay for the land, by issuing bonds, etc. The Supreme Court of that State held the law to be unconstitutional, as being an attempt to transfer to a board appointed by the legislature, a discretion which the common council alone could be authorized to employ.

The argument there on the part of the relators — the park commissioners — was: As the State may create and abolish municipal corporations, and defines and limits their powers at will; as it confers, amongst others, the power to make contracts and to levy taxes for their performance, it may do directly what it may do indirectly; it is not limited to conferring a discretionary power, but may command the municipal legislature to make a particular contract, and compel it to levy taxes to satisfy the obligation assumed by the State for the local government. But the court held, in effect, that under the Constitution of that State, the legislature could only create cities with municipal legislatures elected by the inhabitants, or some of them, with discretionary power in respect to the matters of a local character committed to their charge. Similar views were expressed by the Supreme Court of Illinois, in *The People v. Mayor of Chicago*, 51 Ill. 17; S. C., 2 Am. Rep. 278, that court holding: "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have in their franchises no vested right, and whose powers and privileges the creating power may alter, modify, or abolish at pleasure, yet that power cannot be so used as to compel such a cor-

poration to incur a debt without its consent — to issue its bonds against its will for the erection of a public park, or for any other improvement.”

An attempt by the State legislature to order an improvement within the limits of an incorporated city, and to levy an assessment to pay for it, is as clearly a violation of the independence of action guaranteed by the Constitution to the local legislative assembly, as is a mandate directed to that assembly, commanding them to make such improvement, and to borrow money, or to tax all, or a portion, of the citizens to pay for it, contrary to the wish of the assembly, and to that of the local community whom they represent. Such law is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government, by whatever name it be known, of all choice or discretion in reference to the improvement.

There is no force in the suggestion that the doctrine here asserted will lead to a nullification of general laws, or to a *communism* as objectionable as an extreme centralization.

“There is a clear distinction between the functions of officers whose jurisdiction is limited territorially, considered as agents of the people of the State, and as agents of the people of the municipality. The only confusion existing on this subject has arisen from the custom, prevalent under all free governments, of localizing matters of public management, so far as possible and of making use of local corporate agencies, whenever it can be done profitably, not only in local government, where it is required by clear constitutional provisions, but also for the purpose of State.” Per CAMPBELL, J., in *People v. Common Council of Detroit*, *supra*. “It is important to bear in mind the distinction between State officers — that is, officers whose duties concern the State at large, and the general public, although exercised within definite territorial limits — and municipal officers whose functions relate to the particular municipality.” Dillon on Municipal Corporations, 33. The same individual may unite in himself capacities of a State and municipal officer, but as to the matters in respect to which he acts for the State, he is not a city officer, but a State officer. There is nothing in the nature of things which precludes us from declaring that an officer in his municipal capacity may be clothed with functions and be entitled to immunities with which he is not vested, and which he cannot claim, as agent of the State at large.

Third. I think this court is not estopped from responding to the question last considered, in such manner as shall accord with our convictions of what the law demands.

Our attention has been called to *San Francisco v. Certain Real Estate*

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(Jul. term, 1872), as precluding the further consideration of that question. In that case no opinion has been reported. It was decided from the bench on the supposed authority of *Blanding v. Burr*, 13 Cal. 343; *People v. San Francisco*, 36 id. 595; *Sinton v. Ashbury*, 41 id. 530; *San Francisco v. Certain Real Estate*, 42 id. 515; *San Francisco v. Canavan*, and *Hotaling v. Canavan*, id. 541.

Taking up these cases in reversed order, I find the main question, of itself, decisive of the cases discussed in *San Francisco v. Canavan*, and *Hotaling v. Canavan*, is the character of the title to the *pueblo* lands, the court saying: "The authorities cited completely establish that the tenure by which these lands are held is totally different from that by which lands acquired by a municipality, by gift or purchase, are ordinarily held; and *whatever may be the extent of the legislative power* over the latter class of lands, there can be no doubt that, in respect to *pueblo* lands, it is competent for the legislature to control and direct how they shall be managed and controlled, or disposed of by the municipal corporation." In respect to the subject suggested by the question we have been considering, no argument was made by the court or counsel in *San Francisco v. Canavan*; nor is that subject referred to, in *San Francisco v. Certain Real Estate*, 42 Cal. 515.

In *Sinton v. Ashbury*, it seems to have been *conceded* by counsel that the legislature has power by special act to direct and control the disposition of the funds or property of a municipal corporation for a municipal purpose. 41 Cal. 530. With the premises conceded, of course the court in that case had only to ascertain whether a certain purpose was municipal. *People v. San Francisco* determines a particular statute to be mandatory — the only point discussed by counsel — and *assumes* the power to pass such mandatory statutes. Thus it is seen that of the cases cited in *San Francisco v. Certain Real Estate* (July term, 1872), all the others rely on the reasoning of *Blanding v. Burr*, 13 Cal. 343. And this is also true of *Creighton v. San Francisco*, 42 id. 450. But before commenting on *Blanding v. Burr*, it will be well to refer to other cases cited in *Sinton v. Ashbury*, *supra*. They are: *People v. Alameda*, 26 Cal. 650; and *Beals v. Amador*, 35 id. 632, which also depended on *Blanding v. Burr*; *People v. McCreery*, which has no immediate bearing on any point involved in the present controversy; *Sharp v. Contra Costa*, wherein it was held that a county could not be sued in the absence of a statute authorizing such suit; and *People v. Board of Supervisors, etc.*, 11 Cal. 206, where the court says: "The interesting question argued at the bar, as to the extent of the power of the legislature over the finances of the municipality, does not arise in this case."

In respect to *Blanding v. Burr*, I remark :

(a.) We can agree to the judgment in that case without assenting to the views presented in the opinion of the court.

Burr, one of the board of fund commissioners, refused to sign certain bonds to be delivered to the relator, in the amount of a claim in his favor against the city, allowed by the board of examiners. Burr took the ground that the claim should not have been allowed, inasmuch as the common council had no power to create the liability, having already (when relator's claim accrued) created an indebtedness of more than \$50,000 beyond the annual revenue ; and he relied on a clause of the city charter, which reads : "The common council shall not create, nor permit to accrue, any debts or liabilities which, in the aggregate with all former debts and liabilities, shall exceed the sum of \$50,000 over and above the annual revenue of the city," etc. Had the point made by defendant in that case been decided against him, it would not have been necessary to determine that the legislature had power to compel a municipal corporation to provide for the satisfaction of a supposed obligation which was incapable of enforcement at law or in equity. It is true the court did not decide the point made by Burr, but, on the contrary, declared it unnecessary, in their view of the case, to construe the clause of the statute. But the same clause is thus treated in the able opinion of Mr. Justice COPE, in *Argenti v. San Francisco*, 16 Cal. 264 : "We regard this provision as directory to the common council, and not as a limitation upon the power of the city. It was too indefinite and uncertain to admit of any other construction. Of course, the amount of the annual revenue of the city was incapable of ascertainment in advance of its collection, and it could not have been intended that a debt contracted by the city should be valid or invalid, as the revenue of the year might exceed or fall short of a particular amount." And in *Babcock v. Goodrich*, 47 Cal. 513, this court held a similar provision as to the power of supervisors (Political Code, § 4070) to be directory simply, saying : "The word revenue, as used in the section, cannot mean that the actual money which shall be received in the county treasury. * * * It is the *estimated* revenue which the law-makers had in contemplation. It is their estimate of the revenue at the time an account is presented which must control the action of the board."

(b.) It is to be observed, also, that in *Blanding v. Burr*, it was assumed that the only constitutional restriction upon the power of the legislature to tax, and dispose of the proceeds of taxation, is to be found in the eleventh article of the Constitution—that which provides for equality and uniformity. The court did indeed refer to that portion of

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the thirty-seventh section of article IV, which enjoins upon the legislature the duty to restrict cities and incorporated villages in their powers of taxation and contracting debts, and held that this only imposes the obligation on the legislature to prevent *abuses* in assessments and in contracting debts, and does not prohibit the conferring of new and enlarged powers on municipal governments. The same view of that question was taken in *Grant v. Courter*, 24 Barb. 241. But in *Blanding v. Burr*, the court does not seem to have addressed itself to the broader question which has now been considered, and which may be stated thus: Do the constitutional provisions which require the establishment of cities and incorporated villages, construed in the light of the history of such municipalities and the traditions of our people, restrict the general powers of the State legislature, so that they can neither compel a city to create a debt or levy a tax for a particular city purpose, nor directly intervene to levy an assessment on the property of the whole body, or a portion, of the citizens, for a particular municipal improvement?

Nor was this question discussed in the New York cases especially referred to in *Blanding v. Burr*.

The statute decided to be constitutional in *The People v. The Mayor of Brooklyn*, 4 N. Y. 419, was a statute *authorizing* a municipal corporation, at the discretion of its officers, to employ the powers of assessment, etc. And in the *Town of Guilford v. Cornell*, 18 Barb. 615; 18 N. Y. 148, the courts held that none of the constitutional provisions *relied on by counsel* constituted a prohibition of the act compelling the supervisors of Chenango county to levy a tax, for the purpose in the act indicated, upon the inhabitants of the town of Guilford. The constitutional objections urged against the act, and which were held to be invalid, were: 1. That the *title* was informal. 2. That the act was an assault on private rights. 3. That it was an attempt to deprive citizens of their property without due process of law. 4. That it was an attempt to exercise *judicial* functions.

It may be further said, in reference to the *Town of Guilford v. Cornell*, that the Court of Appeals placed peculiar stress upon a provision of the New York Constitution, which seemed to authorize an appropriation for local purposes by a vote of two-thirds of the members of each branch of the legislature (Art. 1, § 9), Mr. Justice DENIO saying: "There is no question but that this law received the requisite vote." 18 N. Y. 149.

(c.) If the precise question which has been herein considered had been passed upon in *Blanding v. Burr*, this court would not be estopped from considering it anew. It has happened, in the history of the States,

that the framers of a Constitution have been more provident than perhaps they themselves understood — certainly than judges at first view have supposed — and have actually provided checks against evil legislation, which was subsequently assumed not to be prohibited. If after-events have made apparent the enormity of an evil, and upon fuller consideration a court is satisfied that a former judgment is wrong, it ought not to be precluded from asserting the correct rule, unless some principle of public policy shall intervene; as when the establishment of the true rule would so disturb vested interests as would constitute a greater evil than would result from holding fast by the former decision. No such consequence as the disturbance or deprivation of any considerable property rights has been suggested as the result of returning to what I conceive to be the correct construction of the Constitution. The views of this court upon the doctrine of *stare decisis* are fully set forth in *Hart v. Burnett*, 15 Cal. 607. It cannot be contended that the conclusion to which I have arrived will be any violation of that doctrine, as there explained.

Judgment reversed and cause remanded, with direction to the court below to enter judgment for the defendants.

WALLACE, C. J., concurring specially: An assessment, through whatever agency it is levied, is a tax, and it is, therefore, essential to its validity that it proceed upon some ascertained basis of uniformity. The assessment under consideration, as levied in the first instance, did not proceed upon such a basis. As originally levied, it omitted and exempted certain premises lying in the assessment district from the burden which it imposed upon the other premises in that district. As subsequently attempted to be validated by the act of March 30, 1874, this omission and exemption was still preserved and retained.

The "thing wanting," both before and after the passage of that act, was uniformity, and for this reason the assessment was not aided by the legislative act referred to.

Had the act been general and prospective, instead of special and retrospective — had it undertaken to provide for assessments of this character to be levied thereafter, not upon a prescribed basis of uniformity, an assessment levied in conformity therewith would have been void. It is not in the legislative authority to dispense with the required uniformity — whether by prospective acts providing for an assessment to be levied in the future, or retrospective acts seeking to impart validity to assessments already levied.

For these reasons I concur in the judgment, upon the ground first discussed by Mr. Justice MCKINSTRY.

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RHODES, J., also concurring specially: I concur in the judgment for the reasons expressed by the chief-justice; but I am unable to concur with Mr. Justice MCKINSTRY in the conclusions announced upon the second and third grounds discussed by him. Some of the propositions laid down by him might, perhaps, with propriety, have been accepted and applied at the commencement of the judicial history of the State as sound rules and maxims in the construction of our Constitution, and others, perhaps, are deserving of a place in the instrument itself; but at an early day a different construction was adopted in respect to the power which the legislature might exercise over municipal corporations, and in respect to persons and property within their territorial limits, until now many and valuable interests are held which had their origin in and are now dependent on such construction, and in my judgment that construction ought not to be changed except upon more cogent reasons than are presented in this case. I am not prepared at this time to enter upon a discussion of these important questions, but it is not improper to say that there are no reasons upon which it should be held that the power of the legislature over the matters of "assessment" within municipal corporations are limited, that will not equally apply in respect to the power of the legislature over the matters of borrowing money, contracting debts, or taxation for municipal purposes, mentioned in section thirty-seven, Article IV of the Constitution. The grounds upon which the authority is denied to the legislature to direct a particular assessment within a municipal corporation to be levied, would also prohibit the legislature from requiring that a particular debt should be contracted, by the municipality, or a particular tax levied for municipal purposes. If a change in these important provisions is necessary or desirable, it should, in my opinion, be made in the organic law itself, and not by means of a change in its construction.

NATIONAL GOLD BANK AND TRUST COMPANY v. McDONALD.

(51 Cal. 64.)

Check — deposit of — nature of deposit.

Checks deposited with a bank and credited in the depositor's pass-book are taken, in the absence of special agreement, for collection and not as cash; and may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another.

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ACTION to recover the sum of \$785 which the defendant had drawn from plaintiff's bank. The defendant claimed that the check mentioned in the opinion had paid the amount. The defendant had judgment and plaintiff appealed.

S. Heydenfeldt, for appellant.

Dilos Lakes, for respondent.

CROCKETT, J. The defendant and one Barton kept each a general deposit account with the plaintiff, a banking corporation doing a general banking business; and the account of the defendant being overdrawn, he was notified by the plaintiff to make it good. While the account remained thus overdrawn the defendant, on the 22d of May, sold to Barton certain mining stocks, and on that day received from him therefor, Barton's check on the plaintiff for \$785. About two o'clock of the same day, the defendant presented the check with his pass-book to the plaintiff's receiving teller, who took the check and entered a credit for the amount in the pass-book; but made no entry of it on the books of the bank. When the check was drawn and presented to the receiving teller, Barton's account was overdrawn and he had no funds to his credit in the bank then, or at any time afterward. About three o'clock of the same day, the plaintiff returned the check to the defendant, and notified him that Barton had no funds to his credit, and the check was not good; but the defendant refused to receive the check, alleging that it had been accepted by the bank as cash, and placed to his credit as such in his pass-book. Thereupon the defendant made good his account at the bank, except as to the \$785, represented by the check; and if he is entitled to be credited with that sum, the plaintiff has no cause of action. If, on the other hand, he is not entitled to the credit, his account remains overdrawn to that amount, and the plaintiff is entitled to judgment.

At the trial the plaintiff proved, subject to the defendant's objection, that for many years there had been a usage in all the banks of San Francisco, by which, when checks were presented by a depositor to the receiving teller for deposit, he received the checks, whether drawn on that or another bank, and entered a credit for them in the pass-book; that the bank then collected the checks, and when paid entered the proper credits to the depositor on the books of the bank; but if a check drawn on another bank was not paid on due presentation, or if it was ascertained within banking hours on the same day that a check drawn on the same bank in which the deposit was made was not good for want of funds to

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the drawer's credit, the usage was to return the check to the depositor and cancel the credit in the pass-book. On the defendant's motion this evidence was stricken out as inadmissible, and a judgment entered for the defendant, from which the plaintiff appeals.

When checks on another bank are deposited with the receiving teller, and a credit for them entered in the pass-book, it is not contended that they are received as cash, or otherwise than for collection. If not paid on due presentation they may be returned, and the credit in the pass-book canceled. But it is insisted that a different rule obtains in respect to checks drawn on the same bank; and the argument is that the officers of the bank must be presumed to know, and are chargeable with notice of the fact, whether the drawer has funds to his credit when the check is offered for deposit; that, if in fact he has no funds to his credit, and the receiving teller nevertheless receives the check and enters a credit for it in the pass-book, the bank must be held to have adopted the check, and to have received it as cash, assuming the risk of its being made good and of the solvency of the drawer. The argument assumes that the mere fact of the receipt of the check by the receiving teller, and the entry of it in the pass-book, of itself implies an agreement by the bank to accept it as *cash*, and is to be deemed in law as equivalent to the payment of the check. The proof shows that nothing more was done in this case. The check was handed by the defendant's clerk to the receiving teller, together with the pass-book, without any remark, so far as is shown by the evidence, and the teller made the entry in the pass-book and handed it back. If anything more occurred, the evidence fails to disclose it. Does this transaction of *itself* import an agreement by the bank to accept the check as *cash*? Is it in law equivalent to a payment of the check? There can be no doubt that if the bank, through its teller, expressly, or by reasonable implication, from his acts and declarations at the time, agrees to accept the check as *cash*, and to enter a credit to the depositor for the amount, it will be bound by the agreement, whether the drawer of the check has funds to his credit or not. But the question here is, whether the mere receipt of the check by the teller and the entry in the pass-book, nothing more being said or done, of itself constitutes, in law, or is to be deemed equivalent to, such an agreement. In his late work on Banks and Banking (pp. 320, 321), Mr. Morse thus states the rule in such cases: "If the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it in the depositor's bank-book, thus treating it in every respect as if it were a check upon any other bank, instead of upon itself, these facts do not create a payment, or render the bank liable for the amount to the depositor. The

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officers having dealt with the check in the ordinary form, have placed the bank only under the ordinary obligation, to wit, that of collecting the check in due course of business for the benefit of the depositor. The collection is not complete, and the bank does not become indebted to the depositor for the amount until the credit has been actually transferred. But, nevertheless, the depositor enjoys one advantage in this case, which he would not enjoy if the check were upon another bank. The duty of applying the funds of the drawer to meet it accrues as soon as the bank receives it. If there are then, or if there are subsequently deposited, while the bank holds possession of the check, funds to the credit of the drawer, the bank is bound to apply them to the payment of this in preference over any other check which shall be presented, or any other claim or lien which shall accrue *after* the deposit of this check." In support of these propositions the author refers to *Peterson v. Union National Bank*, 52 Penn. St. 206; *Loyd v. Emerson*, 2 Ad. & El. 184; *Kilsby v. Williams*, 5 Barn. & Ald. 815. In the case last cited, the plaintiff had deposited with his banker a check drawn upon the same bank by another person. The deposit was made in the usual way, and was received without objection. The drawer then had no funds to his credit, but subsequently made a deposit sufficient to cover the check. Instead of applying the fund to the payment of the check, the bank paid it out on other checks subsequently presented; and the court held that the bank was liable to the depositor for the amount of the check. In delivering the opinion of the court, ABBOTT, C. J., said: "At the outset of this cause, I thought it was the duty of the bankers, under such circumstance, immediately to tell the person presenting a check for payment that they had not sufficient funds to honor it. But it was urged by Mr. Scarbett, and I thought there was great weight in the argument, that this might be productive of serious inconvenience, inasmuch as it is often impossible to ascertain, till the close of the day at the clearing-house, what sums of money may be paid in to each particular account, and what the drafts are upon it. I think, therefore, that the defendant might, in this case, receive the check in question, subject to its being honored or not, according to the course of Robertson's dealing with them on that day." The court, however, held the bank liable, on the ground that a sum sufficient to cover the check was subsequently deposited by the drawer. In *Loyd v. Emerson*, *supra*, the facts were, that one Matson and the plaintiff each kept a deposit account with the defendant, a banker; and the plaintiff, being the holder of a check drawn by Matson on the defendant's bank, called with the check at the bank, and while transacting some other business, concerning which the officer of the bank was making a memo-

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random, laid the check upon the counter, saying, "Place this to my account," or "to my credit." The bank officer said nothing in reply, and did not notify the plaintiff that Matson's account was then overdrawn, as it in fact was, and had often before been, with the permission of the bank. After the plaintiff left, the officer retained the check, but did not debit Matson with the amount, or credit the plaintiff with it, nor cancel the check. No funds having been deposited by the drawer to meet this check, it was returned in due time to the plaintiff as unpaid for want of funds, and the action was against the bank to recover the amount of the check. The only difference between that case and this is, that in that there is no entry in a pass-book, while in this there was no express request that the amount of the check be placed to the account or credit of the depositor. The court decided that the bank was not liable; and in delivering the opinion of the court, Lord DENMAN, C. J., said: "If the plaintiff, in delivering the check, had said at once, 'Cast me this check,' or 'Give me credit for it,' he must have drawn from Reader a distinct answer; but merely saying, 'Place it to my account, he leaves it upon the usual terms and subject to the contingencies to which bills or checks so paid in are liable; and if he received notice of dishonor in proper time, it was sufficient. * * * I think the plaintiff when he presented the check should have given distinct notice whether he presented it as a check to be paid or to be merely placed to his account like other securities. In the absence of such a statement by him, I draw the inference that the check was received in the latter character." All the other judges concurred in these views; and in his separate opinion, WILLIAMS, J., said: "It appears to me that this check was presented in the ordinary way in which a party pays in a bill to his banker; and there was nothing to prevent the banker from having time to make inquiries respecting it, as in the general case of bills so paid in." This observation applies with much force to the case at bar, in which it appears from the evidence that the check in question was presented to the receiving teller in the usual method in which checks are left for collection. We think this case is not distinguishable in principle from the case at bar.

The rule we intend to lay down is, that when a check on the same bank is presented by a depositor with his pass-book to the receiving-teller, who merely receives the check and notes it in the pass-book, nothing more being said or done, this does not of itself raise a presumption that the check was received as *cash* or otherwise than for collection.

But it is contended that the late case of *Oddie v. The National City Bank*, 45 N. Y. 785; S., C., 6 Am. Rep. 160, is strictly analogous to the

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case at bar, and should be deemed conclusive of the questions involved here. But the opinion of the court in that case must be construed with reference to the facts proved; which, in some important particulars were quite different from the facts of the present case. In that case *after* the check was deposited, and at a later hour of the same day, the drawer deposited a sum much more than sufficient to pay the check, which was paid out on other checks or applied to make good a previous over-draft. There are material discrepancies in the two cases; and the New York case may well have been decided against the bank, on the sole ground that it misapplied the fund deposited *after* the check was received. All that was said by the court on points not necessarily involved in the decision of the cause were at most but *obiter dictum*: and notwithstanding our great respect for the learning and ability of that court, we must decline to follow it, in so far as it shall appear, if at all, that in the course of its opinion it has stated propositions inconsistent with those we have announced.

In the case at bar, the court finds as a fact that the defendant presented the check for deposit *as cash*, and that the plaintiff "received it as such *cash* deposit, and entered the amount of the same to the credit of the defendant *as cash* in the said deposit book." On the motion for a new trial, one of the grounds specified and relied upon was that this finding was not justified by the evidence. It is not pretended that there was any evidence of an express agreement to the effect that the check was offered and received as a *cash* deposit; and the court must have reached that conclusion, as a deduction from the facts above stated. But for the reasons already given, we think the court erred in the deduction, and that the finding is not supported by the evidence.

As the judgment must be reversed for this error, we deem it unnecessary to determine whether the court erred in striking out the evidence in respect to usage.

Judgment and order reversed, and cause remanded for a new trial.

Breuner v. The Liverpool and London and Globe Insurance Company.

BREUNER v. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

(51 Cal. 101.)

Fire insurance — construction of policy — “fallen” building — increased risk.

A building was insured by a policy, conditioned to be void if the building should fall, except by fire. The wall of part of the building fell, leaving more than three-fourths standing. *Held*, that the policy was not avoided.

A policy of fire insurance was conditioned to be void “in case of any change by which the degree of risk is increased, without the written consent of the company.” *Held*, to have reference only to change produced by the act of the insured and not to change occasioned by accident.

ACTION on a policy of insurance against fire issued by the defendant company on plaintiff's brick building. The policy contained among other the following conditions :

“XIII. If a building shall fall, except as the result of a fire, all insurance by this company on it, or its contents, shall immediately cease and determine.”

“II. That in case of any change by which the degree of risk is increased without the written consent of this company, this policy shall be null and void.”

On the 28d of April, 1872, part of the walls of said building (about one-fourth in extent) fell, injuring portions of the remaining walls.

On the 25th of the same month a fire broke out in a wooden building — not part of the insured premises — and was communicated thence to the plaintiff's building, part of which was destroyed.

The court below rendered judgment for the defendant and the plaintiff appealed.

G. W. Spaulding, Beatty & Denson and Henry Edgerton, for appellant.

McAllister & Bergin, for respondent.

BY THE COURT. The court found, as a conclusion of law, “that before said fire, said building had become a fallen building within the terms of the policy set forth in plaintiff's complaint, and that the falling down was not the result of a fire.” This finding, although stated among the conclusions of law, is the finding of an ultimate fact. The plaintiff attacks this finding as contrary to the evidence; and it is stated in the bill of ex-

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ceptions that the only evidence to support it is that upon which finding No. 5 was founded, and that there was no evidence in the case to support a more general finding as to the falling of the building before the fire. The question, therefore, is: Do the matters recited in finding No. 5 support the finding that the building was a fallen building, within the meaning of the policy? It is unnecessary to repeat the matters detailed in that finding, and comment on them at length. Our conclusion is, that they do not show that the building had fallen before the fire occurred. A portion of the building had fallen, but the larger portion — more than three-fourths — was standing, and it was not a fallen building within the meaning of the thirteenth condition of the policy.

The second condition, which is "that in case of any change by which the degree of risk is increased, without the written consent of the company, this policy shall be null and void," has reference only to a change produced by the act of the insured; such a change as the company could consent to, upon the application of the insured, and not to one occasioned by accident, or a cause over which the insured had no control.

Judgment and order reversed, and cause remanded for a new trial.

CROCKETT, J., and MCKINSTRY, J., dissenting: We dissent, on the ground that in our opinion the building, before and at the time of the fire, was a fallen building within the true intent of the thirteenth condition of the policy.

PEOPLE V. HIBERNIA BANK.

(51 Cal. 243.)

Tax — "credits" not property.

A State Constitution provided that "all property shall be taxed in proportion to its value." *Held*, that debts due were not property and were not therefore taxable.

ACTION to recover a tax levied upon debts secured by mortgages. The defendant was a corporation engaged in the business of receiving deposits in money, and loaning out the same for the benefit of the depositors after the payment of expenses. Its loans were secured by mortgage. Between the first Monday in March and the first Monday in June,

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1874, it was assessed for solvent debts, secured by mortgage, in the sum of \$11,866,934.59. The tax levied on this sum was \$77,460.48. The solvent debts were secured by mortgages which were a lien on real estate situated within the State of California, which real estate was assessed at its full value for the tax of the year 1874, without any deduction for the mortgage debt, and the taxes so assessed were paid.

This was an action commenced to recover the tax upon the refusal of the defendant to pay it. The court below rendered judgment for the plaintiff, and the defendant appealed.

The other facts are stated in the opinion.

John B. Felton and *S. F. Leib*, for appellant.

W. O. Burnett and *Creed Raymond*, for respondent.

McKINSTRY, J. "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated." Constitution of California, Art. IX, § 18.

There is no provision in the Political Code which requires, in terms, that debts secured by mortgage shall be taxed. That Code requires that all property shall be taxed, and section 17 declares: "The words 'personal property' include money, goods, chattels, *evidence of debt*, and *things in action*."

Unless the provision of the Constitution above quoted restrains or limits the power of the legislature, so as to prohibit the taxation of "evidences of debt and things in action," it is the duty of the assessors to assess not only mortgages, but all debts "solvent" or not solvent, and also all rights of action, whether arising *ex contractu* or *ex delicto*.

And this, 1st, because it is the established law that *all* property must be taxed, and the legislature has no power to exempt any property; and 2d, because the legislature has declared that all property shall be taxed, and attempted to include in the definition of property all *choses in action*.

But to declare that it is the duty of the assessor to assess all "things in action," is to give a construction to the Constitution which must lead to the grossest absurdities. The Constitution, in its application to the various departments of the Government, and to individual rights, must receive such a construction as to give it a practical operation. There

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would be a contradiction in the single section of the Constitution, if it were construed as requiring that *all* property should be taxed equally and uniformly with reference to its value, and that the word "property" includes those things practically incapable of an appraisement bearing any definite relation or proportion to other things or property.

That causes of action are dependent on too many contingencies to be capable of appraisement which shall accord with any rule of equality or uniformity of value is too plain for argument.

Yet the Constitution requires that all property shall be assessed on the *ad valorem* principle by local assessors. All property which is visible and tangible is capable of such assessment; choses in action are not. The word "property" has been used in our language in several senses; but in the case in hand we cannot be limited to the meaning given it by the Code, but may also — and such is our duty — look for its meaning in the Constitution. The Constitution provides that no property, as property, shall be taxed except such as is capable of a valuation by the assessors, which shall be ratably equal and uniform with that affixed to all other property.

In *Haughton v. Austin*, 47 Cal. 661, it was held that taxation must be thus equal and uniform; and in *People v. San Francisco Savings Union*, 81 id. 138, that a valuation by an assessor is the very foundation of proceedings for apportioning and collecting a tax on property.

The thirteenth section of Article XI of the Constitution requires that each article of property, capable of valuation, shall be fixed or estimated, and the owner thereof made to pay a sum, which shall bear the same proportion to the whole amount levied as does the value of the particular property to the aggregate value of all the property in the State or tax district.

Under our Constitution, therefore, the subject of taxation is the sum of all the values.

Independent of other constitutional restrictions the State might take such portions of the wealth within its borders — the burden being distributed with uniformity — as the legislative department might deem necessary for the support or defense of the Government. In this respect there would be no limitation, save that resulting from moral considerations, addressing themselves to the consciences of individual legislators. Supposing — what would thus be possible in theory — that the necessities of Government required a tax of one hundred per cent on all values; or, what would be the result of such a tax, an appropriation of all the property in the State, it is plain that the State would receive no benefit from evidences of debt due by some of her citizens to o'hers, and

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payable out of the tangible property which the State had already taken.

It is property in possession or enjoyment, and not merely in right, which must ultimately pay every tax.

The legislature may declare that a cause of action shall be taxed, but a cause of action cannot pay the tax; and this because it has, and can have, no value independent of the tangible wealth out of which it may be satisfied.

In a certain sense a promissory note or any credit is property. Whether "solvent," as the term is ordinarily employed, or not, it may be assigned for value; it would be difficult, however, to explain why a note discounted at twenty per cent would be less appropriately called "property" than one sold at par. In any case, a credit has no value other than the value it has acquired by reason of the probability that the property, having present actual value, *upon which a tax is levied and collected*, will be applied to the satisfaction of the claim it represents. He who has the property in possession must be taxed on its value, and the value once taxed cannot be retaxed without a violation of the constitutional provision that each value shall be taxed proportionately to the sum of all the values.

The sovereign power of the people, in employing the prerogative of taxation, regards not the claims of individuals on individuals, but deals with the aggregate wealth of all; that which is supposed to be unlimited is here limited by an inexorable law which parliaments cannot set aside, for it is only to the actual wealth that governments can resort, and, that exhausted, they have no other property resource. This is as certain as that a paper promise to pay money is not money.

It may not be possible in every case to show that the debtor has paid the tax assessed to his creditor. But it admits of mathematical demonstration — if the other property in the State has been assessed at its value — that the money which shall ultimately satisfy the debt (if it is ever satisfied) has paid its tax. If it were practicable to assess all the property in the State at the same moment of time, it would be clear to every mind that an assessment of a credit was an attempt to transfer to it a value elsewhere assessed. It may happen, as the assessor goes his round, that the same piece of tangible personal property is in fact twice taxed; but in every such case the presumption is that he first found in possession has parted with it for its value; that when the second person is assessed, the first has received other property of like value to that twice assessed; so that the uniformity required by the Constitution is maintained in effect. But if a debtor is found to be the owner of \$1,000,

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and is assessed for that sum, and his creditor is found to be the owner of his note for \$1,000, and is assessed for a like sum; and if, the day after the visit of the assessor to the creditor, the debtor shall pay his note, it is clear that the same value has been twice taxed; since the debtor has parted with his money, and received only that which is certainly not taxable property in *his* hands, and which can never afterward be assessed. When a debtor pays his debt he does not abstract or destroy any portion of the taxable property of the State; the aggregate of values remains the same.

In *People v. Eddy*, 43 Cal. 836; S. C., 13 Am. Rep. 143, 145, this court said: "The word 'property' is used in that section of the Constitution in its ordinary and popular sense, and this is the general rule in the interpretation of constitutions and statutes, unless the context shows that the words are used in a technical or some arbitrary sense." With this general proposition I fully agree, but I am not prepared to admit that, in its vulgar sense, the word 'property' includes *all choses in action*. And I feel compelled to dissent from the statement which follows, in the same opinion: "There is no good reason to believe that the word was used in that section (§ 13, Art. XI) in a sense materially differing from that which it has in other sections of that instrument." A single illustration will show that the foregoing is not literally correct. It has never been doubted in these arguments that gold and silver money is property which may be taxed. Such coins are more than promises to pay; they are composed of metals recognized as standards of value throughout the commercial world, and everywhere of purchasing capacity. But it has been repeatedly held that the clause of the Constitution (Art. I, § 8): "Nor shall private *property* be taken for public use without just compensation," prohibits the taking of money. The reason is apparent. The compensation spoken of is money, and it would lead to an absurdity to say that money should be taken for the public, only in case an equal sum of money should be paid to the citizen when the money was taken. Such is the uncertainty of human language, that it is absolutely necessary to consider the *context* in order to determine the sense in which a particular word is employed, if it can ever be employed in more than one.

The facts of the present case do not present any question as to the power of the legislature to require the payment of a specific sum by way of license for the transaction of a particular business, or the performance of particular acts.

The views above expressed remove the objection heretofore resorted to, that the creditor cannot complain if the debtor shall pay a double

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tax. The creditor can always complain, because the credit should not be taxed at all, inasmuch as it has no independent value, and, therefore, cannot be taxed in proportion to such value (as part of the aggregate of values) in the manner required by the Constitution.

And in the foregoing an effort has been made to abstain from any reference to the moral effects of a species of legislation which ordinarily transfers the burden of taxation from the lender to the borrower, and encourages misrepresentation and perjury by permitting the collection of a tax to depend upon the oath of the creditor based on his *opinion* of the solvency of his debtors. The case should be decided by reference to the power of the legislature under the Constitution.

I am of the opinion that "credits" are not "property" subject to taxation within the meaning of the section of the Constitution above quoted.

Judgment reversed and cause remanded. Remittitur forthwith.

WALLACE, C. J., concurring: The question in hand is, whether "credits" are "property" in the sense in which the latter word is employed in the thirteenth section of the eleventh article of the Constitution, which requires all "property" to be taxed in proportion to its value.

It is not doubted, of course, that even though credits be not property in the sense referred to, and, consequently, not to be taxed *as property*, the legislature may, nevertheless, in its discretion, impose a tax upon such credits; as, for instance, it may require stamps of graduated denomination to be affixed to each promissory note or evidence of indebtedness executed, which form of tax, when put in operation, would probably enable everybody (certainly all borrowers) to realize the important truth, that a tax imposed upon credits, *in whatever form it be imposed*, must always be paid, *not by the creditor but by the debtor*.

Returning, then, to the question whether credits must be considered to be "property" in the sense adverted to, it will be remembered that the affirmative was maintained here in *People v. McCreery*, 34 Cal. 482, and upon the authority of that case was assumed in *People v. Eddy*, 48 Cal. 881; S. C., 13 Am. Rep. 143. The question, however, involving as it does the correct construction of the text of the Constitution itself, in respect to a matter of so great and constantly recurring importance as the working of the general revenue system of the State, is not, in my opinion, to be determined by reference to mere precedents, or to decisions already made.

Considerations, upon which the doctrine of *stare decisis* is supposed to be founded, certainly do not attach to a controversy of this character. A re-examination of the general question, wholly unembarrassed by

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what our predecessors or we ourselves may have said, if seen to have been ill-founded in law, does not involve either the possible disturbance of vested rights, or the overthrow of rules of property supposed to have become fixed and settled.

I am of opinion that credits are not property, in the sense in which the "property" is used in the thirteenth section of the eleventh article of the Constitution. That credits are correctly designated as "property," in a general sense, no one of course will deny; and that they fall within the true meaning of that word, as employed in other portions of the Constitution, is readily conceded.

But, as observed by Vattel, "it does not follow either logically or grammatically that because a word occurs in one section with a definite sense, that therefore the same sense is to be adopted in every other section in which it occurs." Book 2, ch. 17, § 285.

It certainly requires neither discussion nor authority to show that in searching for the true sense in which a word has been used in a particular instance, it is proper — in fact, often indispensable — to consider as well the subject-matter which it concerns, as the immediate connection in which it was used. Neither philology, nor criticism, of themselves, afford safe rules for the interpretation of the language of statesmen used in establishing a system of finance, and providing for the fiscal necessities of the State.

The language found in the thirteenth section of the eleventh article of the Constitution, referred to, is as follows: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value," etc.

This provision of the Constitution established the cardinal rule that property taxation in this State should always be imposed upon an *ad valorem*, as contradistinguished from a specific basis, and may be paraphrased thus: "All the actual wealth within this State shall be equally burdened with the support of the Government." That "property," as here employed in the Constitution, and "actual wealth," as used in the paraphrase, are synonymous, and that each of them alike excludes mere credits, is believed to be demonstrable. In the nature of things, both the scale of public expenditure indulged and the consequent degree of taxation necessary for its supply have reference to the actual aggregate wealth for the political community to which government looks for support. These habitually vary as the State is popularly said to be comparatively rich or comparatively poor.

The legislature, in making up the budget, must necessarily, therefore, look to the aggregate amount of actual wealth in the hands of the people

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and borne upon the tax-rolls. This constitutes the capacity to pay, which it is always indispensable for the statesman to consider. And in considering it, how, it may be asked, can it be supposed that the aggregate wealth of the people — their actual capacity to pay taxes — is at all made up of credits — the mere indebtedness owing by individual members of the body politic to others of its members?

An answer would perhaps most readily be found in supposing, were such a thing possible, that the entire tax-rolls exhibited nothing but such indebtedness. Taxation attempted under such circumstances would of course be wholly fanciful, as having no actual basis for its exercise.

It must result, therefore, that mere credits are a false quantity in ascertaining the sum of wealth which is subject to taxation as property, and that, in so far as that sum is attempted to be increased by the addition of those credits, property taxation, based thereon, is not only merely fanciful, but necessarily the unconstitutional imposition of an additional tax upon a portion of the property already once taxed. Thus, if there be within the State only one million and a half in actual material wealth, and if there be in addition a half million of credits, a tax of one per cent imposed upon the two millions thus made up, will prove to be in reality a double tax upon that portion of the one million and a half of actual wealth which is represented a second time as credits; from which double tax the remainder of the actual wealth, however, will escape altogether. To illustrate: let it be supposed that it is shown by the roll that the one million and a half of actual wealth is made up of one million in *goods* and one-half million in *money*, and that the *loan* of the half million in money has created the half million in *credits*. It will be seen that while the one million in goods is set down upon the roll but once, the half million of money is set down twice for the purposes of taxation — once as money in the hands of the borrowers — again as money in the hands of the lenders — in the form of “credits” — that is to say, the promissory notes given by the borrowers. The goods being represented but once are taxed but once; the money, however, being represented twice upon the assessment-roll is twice taxed. This assuredly is not *the equal taxation of property* guaranteed by the Constitution.

The taxation thus imposed nominally upon “credits” having resulted in the double taxation of the money, the additional tax must, of course, be paid by some one. And here all human experience, as well as the settled theories of finance, concur that it is not the lender who pays — but the borrower. The borrower is the consumer. The interest which he pays to the lender is the prime cost of the delay for which he has contracted. If the government, by the imposition of additional taxes,

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increase the cost, the borrower, being the consumer, must pay it. The truth of this proposition is indeed so generally recognized that it is not unusual to insert, in the instrument by which the repayment of the loan is secured, a distinct covenant upon the part of the borrower to refund to the lender all taxes which the latter may be compelled to pay by reason of the loan; and even where the covenant is omitted, the lender is doubtless fully protected at the expense of the borrower, by the exaction of an increased rate of interest upon the loan. To hold, therefore, that "credits" constitute "property" within the intent of the thirteenth section of the eleventh article of the Constitution would be to attribute a meaning to the word "property," as there used, which would not promote, but would utterly defeat the uniformity of property taxation in this State which it was the principal purpose of that section to secure.

I therefore concur that the judgment of the court below be reversed.

CROCKETT, J., concurring: I concur in the opinion of Mr. Justice McKINSTRY, and while it is not to be denied that the proposition that solvent debts are not "property" for the purposes of taxation within the intent of Art. XI, § 13 of the Constitution, it is in conflict with several prior decisions of this court. I am satisfied, upon more mature deliberation and in the light of the later and more exhaustive arguments of the questions, that the former rulings on this point cannot be supported. The Constitution being the fundamental law, it is of the utmost consequence to the people that its provisions should be properly construed. This is peculiarly true of those provisions relating to the power of taxation — a power more subject to abuse than any other, and which directly affects the interest of every citizen. Whatever weight may be due to the rule of *stare decisis*, as applied to other subjects, it ought not, in my opinion, to prevent a return to a proper construction of those provisions of the Constitution which affect the vital question of taxation. No great property rights have grown up under the former construction, which can be injuriously affected by the change in the rule; and I discover no sufficient reason for persisting in a construction, the only effect of which, in a large majority of cases, is to inflict upon the borrowers of money an unjust and oppressive system of double taxation. That this is the necessary result of a tax on debts secured by mortgage for money loaned, is in my opinion, too plain to admit of debate. In the case of *The Savings and Loan Society v. Austin*, 46 Cal. 415, I have stated at length my reasons for that opinion, and it is unnecessary to repeat them here. I still adhere to that opinion; and in addition to the reasons stated by Mr. Justice McKINSTRY why the tax involved in the present case should be

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set aside, I think that the facts disclosed by this record present a clear case of double taxation of the same subject-matter ; and the tax, having been paid by the mortgagors, cannot again be collected from the mortgagee.

But while holding that solvent debts are not "property" in the sense of Art. XI, § 13 of the Constitution, and therefore are not required to be taxed on the *ad valorem* principle, it does not follow that the legislature is for that reason powerless to tax them in some other form. It exercises unquestioned the right to tax avocations, not because an avocation is property, but because the power and mode of taxation are unlimited, except in so far as they are restricted by the Constitution ; and Art. XI, § 13, prescribes the method only in respect to such subjects of taxation as are "property" in the sense of that clause. Solvent debts not being "property" in that sense, cannot be taxed as such under that provision, as was attempted to be done in the present case. But it might be competent for the legislature to require a stamp tax on a mortgage or a promissory note, for the same reason that it may tax the avocation of an auctioneer. In that event it would be a tax on the transaction of making the note or mortgage, and not a tax on the debt as property.

Mr. Justice RHODES dissented.

 NEWHALL v. THE CENTRAL PACIFIC RAILROAD COMPANY.

(51 Cal. 345.)

Stoppage in transitu — when not effective as against assignee of bill of lading.

The vendor of goods shipped them by defendant's railroad to the vendee as consignee, with bill of lading in the usual form. While the goods were in transit the vendee became insolvent and the vendor notified defendant to stop the goods. Shortly after such notification the vendee indorsed the bill of lading in the usual course of business to plaintiff, who in good faith, and without knowledge of the insolvency or of the stoppage, advanced money thereon. *Held*, that plaintiff, on tender of the freight and charges, was entitled to receive the goods from the carrier as against the vendor.

ACTION to recover the value of merchandise alleged to have been converted by defendant to its own use. The merchandise was sold by Samuel Hart & Company, of Philadelphia, and Lawrence & Cohen, of New York, to Adelsdorfer Brothers, of San Francisco, about the 1st of December, 1871, and shipped immediately for San Francisco by the

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Pacific Fast Freight Line, which was a common carrier between the Atlantic coast and San Francisco, to be delivered to Adelsdorfer Brothers, at San Francisco. The defendant owned the railroad between Ogden and San Francisco, which formed a branch of the Fast Freight Line. On the 20th day of December, 1872, Adelsdorfer Brothers became insolvent. On the 3d day of January, 1872, at twenty minutes before 9 o'clock A. M., the vendors notified defendant that the consignees had failed and the goods were not paid for, and that they stopped them in the hands of the defendant. The goods were then in transit. About two hours after this notification, Adelsdorfer Brothers assigned the bills of lading to the plaintiffs, who were auctioneers, and who had been for more than fifteen years in the habit of receiving from the assignors such bills of lading, and selling the goods at auction on their arrival, and reimbursing themselves out of the proceeds. The plaintiffs did not know of the insolvency of the assignors, nor did they know of the notification of the vendors until the 20th of February, 1872. The plaintiff exhibited the bills of lading to the defendant and demanded the goods, but the defendant refused to deliver them, and about the 20th of March, 1872, delivered them to the vendors. The court below rendered judgment for the plaintiffs, and the defendant appealed.

The other facts are stated in the opinion.

Campbell, Fox & Campbell, for appellant. The right of stoppage *in transitu* having been in fact exercised by notices to the carrier, before the indorsement of the bills of lading to plaintiffs by vendees, that indorsement was inoperative, and vested in plaintiffs no greater interest than vendees then had. *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. 843; *Gurney v. Behrend*, 3 El. & Bl. 622; *Mottram v. Heyer*, 5 Den. 634; *Jones v. Earl*, 37 Cal. 631; 2 Kent's Com. 552; *The Tigris*, Law Journal Reports, vol. 32, part 3, p. 99; 6 Whart. (Penn.) 418; Abbott on Shipping (9th ed.), 418; Kay's Shipmaster and Seamen, 460, 461; Jones on Bailments, Appendix, p. 84; Cross on the Law of Lien and Stoppage, 247, marg. p. 389; 20 Wend. 280, 282; 24 N. Y. 643; 3 Kern. 638; *Brain v. Harden*, 2 Carr. & P. 52.

Browne's Law of Carriers, 233, says: "It is almost unnecessary to add, that when the right of stoppage *in transitu* has been exercised, the right is in the nature of a claim to lien, and not an absolute resumption of ownership;" citing 40 Vt. 145; 53 Penn. St. 385; 55 id. 300; 28 Md. 396; 21 La. Ann. 268.

And Robson on Bankruptcy, 310, says: "But the weight of authority and judicial dicta is in favor of the stoppage operating not as a rescission

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of the contract, but only as a restoration of his lien to the vendor ;” citing many cases.

No case has yet been found which intimates that this property thus revested, or this lien thus resumed, can again be made ambulatory or set afloat by any subsequent act of the vendee. It has “revested” or “resumed.”

Robson on Bankruptcy, p. 301, treating of stoppage *in transitu*, says: “A bill of lading indorsed by the consignor and sent by him to the consignee will not of itself divest the consignor’s right to stop the goods,” citing 5 M. & S. 350 ; 3 East, 98 ; 8 M. & W. 442 ; 2 T. R. 674 ; and 8 E. & B. 410, 422 ; “the effect of a document of this sort being to give a right to possession, and not possession itself. But if the bill of lading is before notice of the stoppage of the goods *bona fide* indorsed by the consignee to a third party for value, the right of the transferee will prevail as against the vendor’s *right* to stop.”

W. H. Rhodes, S. M. Wilson, & W. W. Cope, for respondents.

CROCKETT, J. This case comes up on the findings, and there is, therefore, no controversy as to the facts ; the only question being, whether the plaintiffs are entitled to judgment on the facts found. The facts necessary to a correct understanding of the only question of law in the case are, that a mercantile firm in New York sold certain merchandise on credit to a similar firm in San Francisco, and shipped the same in the usual course of business, by railway, to the vendees as consignees, under bills of lading in the usual form. The bills of lading were received at San Francisco by the consignees before the goods arrived ; and while the merchandise was in transit, in the custody of the defendant as a common carrier, the consignees failed, and became insolvent, and thereupon the vendors notified the defendant in writing that they stopped the goods *in transitu* ; that the vendees had become insolvent, and the goods were not paid for, and that they must not be delivered to the consignees, but to the vendors. The plaintiffs then were, and for many years had been, auctioneers and commission merchants, doing business in San Francisco, and had been in the habit of receiving from the consignees bills of lading and goods under them, for sale on commission. About two hours after the notice of stoppage *in transitu* was served upon the defendant, the consignees indorsed and delivered the bills of lading to the plaintiffs, who, on the faith thereof and of the goods named therein, “advanced a sum of money to the consignees in the usual course of business ;” and the sum so advanced was to be reimbursed out of the proceeds of the goods, which

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were to be sold at auction by the plaintiffs. At the time of the indorsement and transfer of the bills of lading to the plaintiffs, they had no notice that the consignees were in failing circumstances, or had failed, or that any notice of stoppage *in transitu* had been served upon the defendant. While the goods were still in the possession of the defendant as a common carrier, the plaintiffs, as holders, exhibited to the defendant the bills of lading, tendered the charges, and demanded a delivery of the goods, which was refused, and the action is to recover their value.

The question involved being one of great practical importance, it has been discussed by counsel, both orally and in printed arguments, with learning and ability. But after the most careful research, they have failed to call to our attention a single adjudicated case in which the precise question under review has been decided or discussed. There are numerous decisions, both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods *in transitu* will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is *Lickbarrow v. Mason* 2 Term R. 63, the authority of which has been almost universally acquiesced in by the courts and text-writers, in this country and in England. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here. But it is important to ascertain the principles which underlie these decisions, that we may determine to what extent, if at all, they are applicable to the case at bar. The first, and, as I think, the controlling point determined in these cases, is, that by the bill of lading the legal title to the goods passes to the vendee, subject only to the *lien* of the vendor for the unpaid price; which lien continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit.

On the failure of each of these conditions, the right of stoppage is gone and the lien ceases, even as against the vendee. But it is further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a *bona fide* purchaser for a valuable consideration *before* the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a *bona fide* holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are

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equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods ; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, without notice of such circumstances as render the bill of lading not fairly and honestly assignable," has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee. *Brewster v. Sime*, 42 Cal. 180

These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made *before* the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made *after* the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person, who, in the language of Mr. Benjamin, in his work on Sales, section 866, takes an assignment of a bill of lading "without notice of such circumstance as renders the bill of lading not fairly and honestly assignable." The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier ; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier — it may be on some remote portion of the route — that the goods are stopped *in transitu*. If a person, taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated. In my opinion the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

ARQUES v. WASSON.

(51 Cal. 620.)

Mortgage — of crops to be planted.

The lessee of land in possession executed a mortgage of the crops to be raised by him the coming season and which were not yet planted. *Held*, that the mortgage was valid.*

ACTION of replevin. The opinion states the case.

T. B. Bishop, for appellant, cited *Bernard v. Eaton*, 2 Cush. 303; *Moody v. Wright*, 13 Metc. 17; *Chynoweth v. Tenney*, 10 Wis. 403; *Congreve v. Evetts*, 10 Exch. 307; *Otis v. Sill*, 8 Barb. 116; *Cudworth v. Scott*, 41 N. H. 461; and *Lune v. Thornton*, 1 Man., Gran. & Scott, 379. The crops to be planted, which it is claimed were mortgaged, had no actual or potential existence at the time the mortgage was made. *Sheppard's Touchstone*, 241; *Hutchinson v. Ford*, 9 Bush (Ky.), 318; *Cudworth v. Scott*, 41 N. H. 461; *Congreve v. Evetts*, 10 Exch. 307; *Comstocks v. Scales*, 7 Wis. 159; *Gale v. Burnell*, 7 Adol. & Ellis (N. S.), 850; *Otis v. Sill*, 8 Barb. 116; *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 id. 17; *Chynoweth v. Tenney*, 10 Wis. 397; *Chapin v. Cram*, 40 Me. 561.

Wm. H. Webb and *James A. Wall*, for respondent.

CROCKETT, J. The action is replevin to recover from the sheriff certain grain and flax seed seized and sold by him under an attachment and execution against one Hansen. The findings show that Hansen leased from the plaintiffs a parcel of land, and from one Reed an adjoining parcel, of both of which he was in possession under the leases; that to secure the rent to be paid to the plaintiffs, and also a store account which he owed them, he duly executed and delivered to them a mortgage (which was duly recorded) upon all the crops of every kind to be produced on said lands during the next ensuing cropping season; that at the date of the mortgage Hansen was in possession of the land, but had not then plowed it or sowed the seed, but proceeded to do so very soon thereafter and produced the crop which is in controversy; that when the crop had matured and had been partially harvested, it was seized by the defendant as sheriff, under an attachment at the suit of another

* See *Apperson v. Moore*, ante, 170; *Wyatt v. Watkins*, 16 Alb. L. J. 205.

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creditor of Hansen, and was subsequently sold by the defendant under an execution issued upon the judgment in said action. The plaintiff recovered and the defendant appeals.

The point chiefly relied upon for a reversal is, that at the date of the mortgage the crop had not even a potential existence, the ground not having been plowed or the seed sown; and it is claimed that there can be no valid mortgage of a thing not *in esse*. It is conceded by counsel that if the thing has a potential existence, as, for example, wool to be grown from sheep then belonging to the mortgagor, or butter to be thereafter produced from his cows, or a crop arising from seed already sown, the mortgage would be valid. The general rule undoubtedly is that a person cannot convey a thing not *in esse*, or in which he has no present interest. But it is quite as well settled, that if the thing has a potential existence it may be mortgaged or hypothecated. "If one, being a person, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise, for the tithes are potentially in the person. * * * So one may grant all the wool of his sheep for seven years; but not of the sheep which he shall thereafter purchase." *Van Hoozer v. Cory*, 34 Barb. 12, and authorities there cited. "Land is the mother and root of all fruits. Wherefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant." *Grantham v. Hawley*, Hob. R. 132. In *Van Hoozer v. Cory*, *supra*, the court holds that "the same principle is adjudged applicable to the annual crops, the fruit of the annual labor of the lessee, as if a lessor covenants that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant." So there may be a valid grant of the grain that a field is expected to grow. 1 Parsons on Cont. 523; *McCarthy v. Blevins*, 5 Yerg. 195. In *Van Hoozer v. Cory*, *supra*, the grant was of the cheese expected to be made from the cows of the grantor, and "the products expected to be raised upon the premises then demised to the grantor;" and this was held to be a valid grant. In that case the question involved here was carefully considered by the court upon a full examination of the authorities, and we are satisfied with the conclusion to which it arrived. But the same question arose in the later case of *Conderman v. Smith*, 41 Barb. 404, in which the ruling in *Van Hoozer v. Cory* was approved; and JOHNSON, J., in delivering the opinion of the court, said: "That case (*Van Hoozer v*

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Cory), like this, was an action by the lessor and purchaser, against a creditor of the lessee, who had taken and sold the products of the farm and dairy upon execution ; and the court held that it did not fall within the rule which prohibits the selling or mortgaging of property not in existence, or not owned by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was, as it is expressed in the books, potentially his, and, therefore, the subject of sale." On the rule established in these cases, the crop mortgaged to the plaintiffs had a potential existence, and the mortgage was valid.

Judgment and order affirmed.

Mr. Chief Justice WALLACE and Mr. Justice MCKINSTRAY dissented.

CASES
IN THE
S U P R E M E C O U R T
OF
NEVADA.

STATE v. SWIFT.

(10 Nev. 176.)

Statute — conclusive as enrolled — evidence to impeach.

The official copy of a statute duly enrolled and authenticated is conclusive evidence of the law ; and the court cannot resort to the journals of the legislature nor to any other extrinsic evidence to ascertain whether the statute was in fact duly enacted.*

A PPLICATION for a writ of *mandamus* to compel the respondent, sheriff of Ormsby county, to issue to relator a license to conduct and keep a faro-bank in Carson city. The opinion states the case.

Robert M. Clarke, for relator.

William Patterson and *T. W. W. Davis*, for respondent.

BEATTY, J. The respondent is sheriff of Ormsby county. As such sheriff it is his duty, upon proper demand and tender of the amount prescribed by statute, to issue licenses authorizing the holders to conduct certain banking games, including the game of faro. The relator, a citizen of Ormsby county, made a proper demand upon the respondent for a quarterly license to conduct a game of faro in Carson City, in said county, and at the same time tendered in payment therefor the sum of

* See acc. *Mayor v. Harwood*, 3 Am. Rep. 161; S. C., 32 Md. 471; *Louisiana State Lottery v. Richoux*, 8 Am. Rep. 602; S. C., 23 La. Ann. 743; *contra*, *Berry v. Baltimore*, etc., 20 Am. Rep. 69; S. C., 41 Md. 446; *Moody v. State*, 17 Am. Rep. 28; S. C., 48 Ala. 115; *State v. Pratt*, 16 Am. Rep. 347; S. C., 2 S. C. 150; *Osburn v. Haley*, 13 Am. Rep. 640, and note; S. C., 5 W. Va. 85; *People v. Commissioners*, 13 Am. Rep. 581; S. C., 54 N. Y. 276; *Opinions of the Judges*, 52 N. H. 622; *English v. Oliver*, 28 Ark. 317; *Larrison v. Peoria, etc., R. R. Co.*, 77 Ill. 12; *Legg v. Mayor*, 42 Md. 203.—**REP.**

\$203.50 in gold coin. The amount thus tendered was sufficient to entitle the relator to the issuance of the license, as demanded, provided section 4 of the gaming act of 1869 (2 Compiled Laws, 3292) is still in force. But among the regularly certified enrolled and published acts of the last legislature is one entitled "An act to amend 'An act to restrict gaming,' passed March fourth, eighteen hundred and sixty-nine, and all acts amendatory thereof." By the second section of this act, section 4 of the act of 1869 is so amended as to require payment of \$400 for a quarterly gaming license.

Assuming the validity of this enactment, the respondent refused to issue the license for the amount tendered, and the relator, denying its validity, asks us to compel him by *mandamus* to do so. It is not pretended that any provision of the act is unconstitutional in its terms, but we are told that an inspection of the legislative journals and other documents will show that this section two of the amendatory bill, as enrolled, was never passed by the legislature; that it was adopted as an amendment in the senate to the bill as originally passed in the assembly; that the assembly refused to concur in the amendment, and the senate thereupon receded, and concurred in the bill as originally passed in the assembly; that nevertheless this amendment, which was finally rejected by both houses, and never assented to by one of them, was engrossed in the bill which was signed by the officers of the two houses, presented to the governor for his approval, approved and signed by him, and deposited in the office of the secretary of State, where it now appears as part of the statute-roll.

If this court, for the purpose of informing itself of the existence of a public statute, or testing its validity, is at liberty to look beyond the statute-roll, solemnly attested in accordance with the provisions of the Constitution, and is bound to give controlling force to the entries in the legislative journals, then, in this case, it does clearly appear from an examination of those journals that assembly bill No. 138, entitled as this act is entitled, was finally passed in the terms in which it was introduced, after the rejection of an amendment proposed and originally adopted in the senate. But as the journals do not purport to contain the language or even the substance of either the bill or the amendment — only referring to it by its number and title — they cannot, by themselves, as a matter of course, impeach the enrolled act, for the two are easily and completely reconciled by supposing that the bill was originally drawn in the terms of the enrolled act. We are accordingly asked by the relator to go a step further and look at a paper now in the office of the secretary of State, purporting to be the original bill as introduced into the

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assembly — the bill, it is said, to which the journals refer, and which, by a comparison with the journals and statute-roll, shows that section two, as approved by the governor, and enrolled, was never passed by the legislature. If we are at liberty to institute this examination and comparison, and if credit is to be given to the journals and this loose paper in preference to the statute-roll, then the conclusion of relator seems to follow. We have no doubt, as matter of fact, that the paper referred to is the original of assembly bill No. 138. It is so indorsed; it has the same title; on the back are memoranda signed by the assistant secretary of the senate and the assistant clerk of the assembly, showing the action upon it of the two houses, and these memoranda correspond with the entries in the journals in date, as in other particulars. It is found among the archives of the last assembly deposited in the office of the secretary of State, where the law requires the clerk of the assembly, at the close of each session, to deposit all such papers, properly arranged and labeled. Stat. 1873, p. 155, § 5.

Such being the marks of its identity, we are satisfied that it is what it purports to be — the original bill for the act in question. Its contents, except in the second section, are the same as those of the enrolled statute. That section, as originally drawn, is crossed out by pencil-marks, and over it is pasted to the margin of the paper a tag, on which is written, "Strike out section two and insert the following." Then follows section two of the enrolled act, which differs materially from the original section, not only in respect to the amount to be paid for a quarterly gaming license, but in other particulars. On the margin of the tag these words appear in pencil: "Adopted in Senate." This seems pretty clearly to identify the contents of the tag or rider, and of section two of the enrolled bill with the rejected senate amendment; and it follows, therefore, on the assumption that these matters, extraneous to the statute-roll, must be noticed, that the bill passed by the legislature was never approved by the governor, and that the bill approved by the governor was never passed by the legislature; and, consequently, that the amendatory act is void; the old act remains in force; relator's tender was sufficient, and the *mandamus* ought to issue.

It results, therefore, that the question of law directly presented for our decision relates solely to a rule of evidence. How is a court to be satisfied as to the existence and terms of a statute? Is it bound by the statute-roll, or can it look beyond that record? And if so, how far can the investigation be extended? The importance of these questions in their general bearing cannot easily be over-estimated. The determination of this particular case may affect very slightly the public revenues

or the public morality, but it is a matter of very great moment to every citizen of the State, that on the first presentation of the question here, this court should lay down a correct and safe rule by which he may determine what that law is which is to bind him in all his transactions, giving its construction to his agreements, limiting the measure of his rights, and his mode of redress where his rights are invaded. For whoever engages in any transaction the validity or construction of which depends upon statutory provisions, whoever holds or acquires any sort of property, or right, the title or enjoyment of which may be affected by the operation of any law, is bound to take notice, at his peril, what the law is. And it is not enough for him to know what the law is after a court of last resort has made an investigation and determined what part of the statute-roll is to stand and what part to fall, but he must know in advance of litigation, and govern his conduct accordingly. If there is any record or document outside of the statute-roll to which a court will resort for the purpose of testing the validity of an enrolled law, he must not overlook it. If a court will hear oral testimony to impeach the record, he must be able to conjecture in advance what the testimony will be, and what weight will be allowed to it. Considering the exigency of this rule it is easy to perceive of what extreme importance it is that there should be some high, authentic and unquestionable record to which not only courts and public officers, but private citizens, may resort, and by a simple inspection determine for themselves with infallible certainty what are the statutes of the State, and what are their terms. Considerations such as these had led to the firm establishment in England, at a date anterior to American independence, of the maxims that matters of public law are not the subject of allegation or denial in pleading, nor of proof upon the trial of causes; but that courts would always take judicial notice of the law, and that, upon the suggestion of any doubt as to the existence or provisions of a parliamentary enactment, the court would inform itself in the best way it could, not by listening to proofs, but by inspection of the record, if it was in existence, and if not, by looking to the printed statute, or, failing that, by examination of other documents where it had been recited, recognized and acted upon. The record, which, as long as it existed, was held to import absolute verity, which not only dispensed with, but excluded all other evidence which could neither be aided nor impeached by the journals of parliament, was the copy of the act enrolled by the clerk of the parliament and delivered over into chancery. The question frequently arose in England, but the rule was uniformly maintained that the courts would look to the statute-roll, and to that alone. The English authorities upon this point are

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thoroughly reviewed, and their results clearly and ably stated in the cases of *Sherman v. Story*, 30 Cal. 256, and *Pangburn v. Young*, 82 N. J. 41. The rule they establish was part of the common law long before the question here presented ever arose in this country. If applicable to our condition and not abrogated by constitutional or statutory provisions, it was, and is, binding upon the courts of every State that has adopted the common law as the rule of decision. Moreover, being founded upon the gravest considerations of public policy, and expressing the wisdom derived from centuries of experience, it would seem that such a rule should not be lightly departed from. Nevertheless, it will appear that there is a serious conflict of authority in this country as to whether the ancient rule should be upheld or not. A review of the decisions, however, I think will show that the weight of authority is in its favor. The question appears to have been decided in fifteen States. In nine States, viz., Connecticut, New York, New Jersey, Maryland, Missouri, Iowa, North Carolina, Indiana and California, the old rule is upheld. In six States, viz., Alabama, Arkansas, Illinois, South Carolina, Minnesota and New Hampshire, it is repudiated. In Michigan there are *dicta* in favor of the new departure. In Ohio and Kentucky the question has been noticed, but its decision waived. In Mississippi the court divided on the question. A more particular examination of the cases will show that in every instance where the question seems to have been thoroughly considered, after a conscientious examination of the authorities, the decision has been in favor of the old rule. This remark is especially applicable to the opinions delivered in the most recent cases involving the question in California, New Jersey, Indiana, and Missouri. Where, on the contrary, the decisions or *dicta* of courts have been in favor of the innovation contended for, it will be found that they have either ignored all precedent, or, as is more frequently the case, that they assume to sustain their position by reference to authorities which turn out on examination to be adverse, or to have been overruled. To vindicate the soundness of this criticism, a short review of the cases in which the new doctrine has been countenanced or upheld will be necessary. To the others, with one or two exceptions, only a general reference will be made. Before entering upon this discussion, however, it will be convenient to notice those provisions of our Constitution which have an especial bearing upon the question at issue — provisions similar to those which in some other States have been held to warrant a departure from the old rule: “Each house shall keep a journal of its own proceedings, which shall be published, and the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the journal.” Constitution, Art. IV, § 14.

“ Every bill shall be read by sections on three several days in each house, unless, in case of emergency, two-thirds of the house where such bill may be pending shall deem it expedient to dispense with this rule ; but the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journals of each house ; and a majority of all the members elected to each house shall be necessary to pass every bill or joint resolution, and all bills or joint resolutions so passed shall be signed by the presiding officers of the respective houses, and by the secretary of the senate and clerk of the assembly.” Art. IV, § 18.

In obedience to these provisions of the Constitution, each house of the legislature keeps a journal, which is authenticated by the signature, to the minutes of each day's proceedings, of the president and secretary in the senate, and the speaker and clerk in the assembly. These minutes, except those of the last day's proceedings of each session, are usually read over in the presence of the respective houses, and an opportunity given of correcting them before they are signed. Their correctness has, therefore, the implied sanction of the entire body of each house. But, in point of fact, they are often read and signed in the absence of many members whose votes they record ; and the minutes of the last day's proceedings, which are never corrected for want of opportunity, often relate to the final passage of the most important and essential bills — such, for instance, as the appropriation bills. Obviously, then, the journals have no greater intrinsic value as evidence than the enrolled bill, which, in compliance with the above-quoted provision of the Constitution, is signed and attested by the very same officers who sign the journals.

These provisions of our Constitution and the practice thereunder, it will be observed, are substantially identical with those of other States whose decisions are to be mentioned. The following authorities are referred to: In New York: *Thomas v. Dakin*, 22 Wend. 9 ; *Warner v. Beers*, 23 id. 103 ; *Purdy v. People*, 2 Hill, 31, and 4 id. 384 ; *De Bow v. People*, 1 Denio, 9 ; *Com. Bank of Buffalo v. Sparrow*, 2 id. 97 ; *People v. Supervisors, etc.*, 8 N. Y. 317 ; *People v. Devlin*, 33 id. 269. In California: *Sherman v. Story*, 30 Cal. 256. In Missouri: *Pacific R. R. v. Governor*, 23 Mo. 358. In New Jersey: *Pangborn v. Young*, 32 N. J. 29. In North Carolina: *Brodnax v. Groom*, 64 N. C. 244. In Maryland: *Fowke v. Fleming*, 13 Md. 412. In Indiana: *Evans v. Browne*, 30 Ind. 514. In Iowa: *Duncombe v. Prindle*, 12 Iowa, 1. In Connecticut: *Eld v. Gorham*, 20 Conn. 16. All these cases support the old rule, and no more particular reference to the decisions would be

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necessary except for the singular fact that the earlier New York cases have usually been relied upon as supporting the new doctrine. An examination of the cases, however, will show that they do nothing of the kind. By the Constitution of New York a two-thirds majority of each house of the legislature was required to pass certain classes of bills, and a law of the State provided that no act should be deemed to have passed by a two-thirds majority unless it was so certified by the presiding officer of each house. Another law made the printed statutes certified by the secretary of State, evidence as to what the statutes were. Certain laws were printed in the statute-book which it was claimed were of the class requiring a two-thirds majority for their enactment, and no certificate that they had been so passed was printed with them. The question that arose was whether the court could go behind the printed statute-book and look at the enrolled bill to see if it was certified as having passed by the requisite majority. And it was held that they could look at the enrolled bill, and they did so, and found that it had not so passed. But there was no question about going behind the enrolled bill and impeaching it by reference to the journals or any thing else. It is true one or two senators in the Court of Errors let fall some loose *dicta* about looking to the journals, and Chief Justice BRONSON afterward (*De Bow v. People*, 1 Den. 14) fell into the error (speaking of the decision in *Purdy v. People*, 4 Hill, 384, of saying, "And it seems that the journals kept by the two houses may also be consulted." This *dictum* of Judge BRONSON, founded upon a *dictum*, seems to have led the court of several other States to believe that the question had been so decided in New York. But in truth it never has been so decided there, and in the latest New York cases that have fallen under our observation, where the point was raised, it was expressly decided otherwise. Speaking of the directions of the Constitution as to the passage of laws, the court says: "It has never been the practice for the presiding officers to certify that these directions of the Constitution were complied with. The presumption is that they were; and in my judgment it is not admissible to prove the contrary in any case, and certainly not where the pleadings have not tendered an issue upon that fact." 8 N. Y. 327. In *People v. Devlin*, 33 N. Y. 269, the question is thoroughly investigated, and the authorities reviewed. The conclusion of the court is, that they cannot look beyond the enrolled bill. This case, together with those cases cited from 23 Mo., 30 Ind., 30 Cal., and 32 N. J., deserve particular attention. All are recent cases, and the opinions delivered evince unusual research and marked ability. The same may be said of the opinion of Mr. Justice HANDY, of Mississippi, *Green v. Weller*, 32 Miss. 685. But in that case

the chief justice dissented on the question under consideration, and the other associate justice expressed no opinion. From among these opinions we select that of the New Jersey court for extended quotation, for the reason that our Constitution is the same as that of New Jersey, in every particular affecting this question, and because the whole argument is there very forcibly and fully set forth.

After describing the enrolled bills in language strictly applicable to those of this State, and reciting the provisions of the Constitution as to the keeping and publishing of journals and the mode of passing bills, the court proceeds to say: "These are all the constitutional requirements relating to these diaries, and it will be observed, that with the exception of recording the yeas and nays on certain occasions, there is no prescription in the Constitution of what they shall contain. They are not required to be attested in any way whatever; nor is it said that they shall even be read over to the house, so that their correctness may stand approved.

"From this comparison, it seems to me impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of these journals, did not design to create records which were to be paramount to all other evidence with regard to the enactment and contents of laws. At the time of the formation of the Constitution, the mode of authenticating statutes by copy enrolled in the office of the secretary of State was completely established by common usage, and by the sanction of its antiquity; and it was also obvious that a copy of an act thus enrolled was, in every essential particular, almost identical with a roll of parliament, which it was well known was not only admissible in evidence, but was conclusive as to the existence and provisions of the law which it embodied. Possessed of this knowledge, it is difficult to believe that the eminent jurists who, as delegates, helped to frame the Constitution of 1844, meant to substitute a journal which was devoid of all the ordinary marks of authenticity, considered as a means of proof in a court of law, for a record which, in point of evidential efficacy, had no superior. If intended as evidence for any purpose whatever in any course of judicial investigation, can any one conceive that these registers would have been left in the condition in which by the Constitution we find them? In the nature of things they must be constructed out of loose and hasty memoranda, made in the pressure of business, and amid the distraction of a numerous assembly. There is required not a single guarantee of their accuracy or their truth; no one need vouch for them, and it is not enjoined that they should be either approved, copied or recorded. It must be admitted, I think, from these considerations, that a

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strong presumption arises that it was not the purpose of those who framed the Constitution, in enjoining each house to keep a journal, to establish such journals as the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions in the enactment of laws.

“ But independent of this question of intention as exhibited in our primary law, the more general inquiry arises, can the court resort to this source of information to satisfy itself on the point whether a legislative act has been thus constitutionally passed? The first consideration which naturally suggests itself in this connection is, that the legislature has, with care and a wise precaution, adopted a mode of certifying its own acts in an authentic form. And, indeed, so completely has this purpose been effected, that it appears hardly practicable to suggest additional safeguards. To the correctness of the present bill, for example, we have the signature of the presiding officer of each house. In its present form it was exhibited to the governor as the bill which had been enacted, and as such received his approval, as is evidenced by his signature. It was then immediately made public by being filed in the office of the secretary of State. These are the sanctions which the legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals; and the question is therefore presented whether such authentication must not be deemed conclusive; or, in other words, whether the legislature does not possess the right of declaring what shall be the supreme evidence of the authenticity of its own statutes.” [The case is stronger in Nevada, for here the Constitution itself prescribes the mode of authenticating the statutes, and provides not only that they shall be signed by the presiding officers of the two houses of the legislature, but also by the secretary of the senate and the clerk of the assembly. Art. IV, § 18.]

“ This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form. In point of fact, the legislative authority over the certification of its own laws is, of necessity, almost unlimited, as will appear from the circumstance that with regard to the body of an act there is no evidence of any kind but that which the legislature itself furnishes in the copy deposited in the State archives. The journals do not purport to contain more than the amendments, so that the legislative control is absolute with regard to the essential parts of the laws which are enacted. We are also to reflect that it is the power which passes the law which can best determine what the law is which itself has created. The legislature in this case has certified to this court, by the

hands of its two principal officers, that the act now before us is the identical statute which it approved; and, in my opinion, it is not competent for this court to institute an inquiry into the truth of the fact thus solemnly attested. Nor do I think this result is to be deprecated. I think the rule thus adopted accords with public policy. Indeed, in my estimation, few things would be more mischievous than the introduction of the opposite rule. A little reflection will satisfy most persons of the truth of this remark. Let us examine the proposition in a few words. The rule contended for is that the court should look at the journals of the legislature to ascertain whether the copy of the act attested and filed with the secretary of State conforms in its contents with the statements of such journals. This proposition means, if it has any legal value whatever, that in the event of a material discrepancy between the journal and the enrolled copy, the former is to be taken as the standard of veracity, and the act is to be rejected. This is the test which is to be applied, not only to the statute now before the court, but to all statutes; not only to laws which have been recently passed, but to laws the most ancient. To my mind nothing can be more certain than that the acceptance of this doctrine by the court would unsettle the entire statute law of the State."

The court then proceeds to remark how incomplete, and how much exposed to the chances of inaccuracy and mistake, the journals must always be. After which it continues:

"Can any one deny that if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its foundations? Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons, or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. The misplacing of a name, on a nicely-balanced vote, might obviously invalidate any act. What assurance is there, therefore, that a critical examination of these loosely kept registers will not reveal many fatal errors of this description? In addition to these considerations in judging of consequences, we are to remember the danger, under the prevalence of such a doctrine, to be apprehended from the intentional corruption of evidence of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals, for it is obvious that any law can be invalidated by the interpolation of a few lines, or the obliteration of one name and the substitution of another in its stead. I cannot

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consent to expose the State legislation to the hazards of such probable error or facile fraud.

“The principal argument in favor of this judicial appeal from the enrolled law to the legislative journal, and which was much pressed in the discussion at the bar, was that the existence of this power was necessary to keep the legislature from overstepping the bounds of the constitution. The course of reasoning urged was that if the court cannot look at the facts and examine the legislative action, that department of government can, at will, set at defiance, in the enactment of statutes, the restraints of the organic law. This argument, however specious, is not solid. The power thus claimed for the judiciary would be entirely inefficacious, as a controlling force, over any intentional exorbitance of the lawmaking branch of the government. If we may be permitted, for the purpose of illustration, to suppose the legislature to design the enactment of a law in violation of the principles of the constitution, a judicial authority to inspect the journals of that body would interpose not the slightest barrier against such transgression; for it is obvious that there could not be the least difficulty in withholding from such journals every fact evincive of such transgression. A journal can be no check on the actions of those who keep it, when a violation of duty is intentional. It cannot, therefore, fail to be observed how inadequate to the correction of the supposed evil is the proposed remedy. Besides, if the journal is to be consulted, on the ground of the necessity of judicial intervention, how is it that the inquiry is to stop at that point? In law, upon ordinary rules, it is plain that a journal is not a record, and is, therefore, open to be explained or contradicted by parol proof. And yet, is it not evident that the court could not, upon the plainest grounds, enter upon such an investigation? In the case now in hand, if the offer should be made to prove by the testimony of every member of the legislature that the journals laid before us are false, and that, as a matter of fact, the enrolled law did receive, in its present form, the sanction of both houses, no person versed in jurisprudence, it is presumed, would maintain that such evidence would be competent. The court cannot try issues of fact; nor, with any propriety, could the existence of statutes be made dependent on the result of such investigations. With regard to matters of fact, no judicial unity of opinion could be expected, and the consequence would necessarily be that the conclusion of different courts, as to the legal existence of laws from the same proofs, would be often variant, and the same tribunal which to-day declared a statute void, might to-morrow be compelled, under the effect of additional evidence, to pronounce in its favor. The notion that

courts could listen upon this subject to parol proof is totally inadmissible, and it therefore unavoidably results, that, if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed, nor its errors corrected. And if this be so, and the journal is to limit the inquiry of the judicial power, how obvious the inadequacy, if not futility of such inquiry? In my estimation, the doctrine in question, if entertained, would, as against legislative encroachments, be useless as a guard to the Constitution, and it certainly would be attended by many evils. Its practical application would be full of embarrassment. If the courts, in order to test the validity of a statute, are to draw the comparison between the enrolled copy of an act and the entries on the legislative journal, how great, to have the effect of exploding the act, must be the discrepancy between the two? Will the omission of any provision, no matter how unimportant, have that effect? The difficulty of a satisfactory answer to these and similar interrogatories is too apparent to need comment. And again, to notice one among the many practical difficulties which suggest themselves, what is to be the extent of the application of this doctrine? If an enrolled statute of this State does not carry within itself conclusive evidence of its own authenticity, it would seem that the same principle must be extended to the statutes, however authenticated, of other States. An act, therefore, of Virginia or California, with regard to the mode of its enactment, would be open to trial as a matter *in pais*. And indeed, the doctrine, if carried to its legitimate conclusion, would seem to abolish altogether the conclusiveness even of international authentications, for if the great seal of this State, attesting the existence of a statute, is not final, it is not perceived how a greater efficacy is to be given to the seal of a foreign government.

“ In addition to the foregoing observations, I cannot close this part of my examination of the question under discussion without adverting to a further consideration, which to my mind appears to be entitled to very great, if not decisive weight. I here allude to the circumstance that, in the structure of the government of this State, the judicial and legislative departments are made coequal, and that it nowhere appears that the one has the right of supervision over the other. It is true, as was much pressed on the argument, that the legislative branch may willfully infringe constitutional prescriptions. But the capacity to abuse power is a defect inherent in every scheme of human government, and yet, nevertheless, the forces of government must be reposed in some hands. The prerogatives to make, to execute and to expound the laws must reside somewhere. Depositaries of those great national trusts must be

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found, though it is certain such depositaries may betray the trust thus reposed in them. In the frame of our State government the recipients and organs of this threefold power are the legislature, the executive and judiciary, and they are co-ordinate—in all things equal and independent; each within its sphere is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law which is admitted to have been enacted, void, by reason of its unconstitutionality. That is clearly a function of judicature. But the proposition is, whether, when the legislature has certified to a mere matter of fact, relating to its own conduct and within its own cognizance, the courts of the State are at liberty to inquire into or dispute the veracity of that certificate. I can discover nothing in the Constitution, or in the general principles of government, which will justify the assumption of such superior authority. In my opinion the power to certify to the public the laws which itself has enacted, is one of the trusts of the Constitution to the legislature of the State.”

This able opinion of the chief justice of New Jersey is reinforced by a concurring opinion of one of the associate justices, in which the argument is further illustrated and enforced. It is sustained by the amplest citation of authorities, and by the conclusions independently reached upon the same line of argument, by the Supreme Courts of California, New York, Indiana and Wisconsin. It fails to notice only one consideration urged upon the hearing of this case, and that is, that besides the necessity of looking to the journals for the purpose of restraining the legislature from intentional violation of the Constitution in the passage of laws, it is necessary to do so in order to correct the mistakes of the officers in certifying its acts. The answer to this is that the journals are as likely, at least, to contain mistakes as the enrolled laws, and if they did in one instance afford the means of correcting a mistake of enrollment, they might in another instance, by their own inaccuracy, destroy a law of the utmost importance that was actually passed. Practically, it cannot be considered any greater evil that the people of Nevada should be subject for two years to the operation of a law, one clause of which was not concurred in by the assembly, than that they should be deprived of the advantages of some other law, actually passed, but which an inaccuracy of the journal might impeach. The hope of doing good by the course suggested is more than overbalanced by the danger of doing harm, and, therefore, presents no equivalent for the incalculable disadvantage of reducing the statute law from a state of

certainty to one of everlasting doubt. We say *everlasting*, because there is no direct proceeding in which the validity of a statute can be once tested and set at rest. The question could only arise collaterally in a controversy between individuals, and its determination would not render it *res judicata* in any other controversy, even between the same parties. It would have to be tried over and over again, and no man ever would know whether there was a law or no law until his case had been determined. We are not prepared, for the sake of such results, and without the prospect of any substantial gain, to overthrow an old and firmly established rule of evidence—a rule which has indeed been questioned, but we think not invalidated by the following decisions, which we notice for the purpose of pointing out the reasons why, in our estimation, they are entitled to but little weight.

The leading case in favor of the new departure is that of *Spangler v. Jacoby*, 14 Ill. 297, and it is especially deserving of our attention because it gave a construction to provisions of the Illinois Constitution substantially identical with the provisions of our own Constitution before its adoption; from which it might be held that along with the provisions we had adopted the construction previously given to them. But this argument is weakened by the fact that the same or similar provisions are contained in most of the State Constitutions, and they cannot be supposed to have been borrowed especially from Illinois.

The Constitution of Illinois, like our own, provides that "each house shall keep a journal of its proceedings;" that "on the final passage of all bills the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house."

From these provisions it is concluded that the journals, being required to be kept by the Constitution, and to show affirmatively a majority vote in favor of the final passage of every bill, are records of as high authority at least as the enrolled bill, and that where they fail to show a majority voting for the bill on its final passage in either house, the act falls to the ground. The utmost extent to which this decision goes, however, is, that the journals may be looked to to see if they contain the evidence which the Constitution requires they should contain of the final passage of the bill; and they may be looked to because they are records. It is not hinted that the court may look beyond the record. The decision is based partly upon reasons drawn from the nature of the constitutional provisions, and partly upon the assumption that it is supported by authority. As to the constitutional reasons, they have been noticed in another connection. As to the authorities it is to be

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observed that the English authorities are not alluded to. The American authorities cited are: *State v. McBride*, 4 Mo. 303; *Green v. Graves*, 1 Doug. (Mich.) 351; *Purdy v. People*, 2 Hill, 31, and 4 id. 384. Of these three cases the Missouri case alone even seems to sustain the doctrine in support of which it is cited; and if it ever did sustain it, it has been overruled by a more recent case in the same State: *Pacific R. R. v. Governor*, 28 Mo. 353. But in truth it never bore the construction placed upon it, as is clearly pointed out in the later case referred to.

The only point decided in the Michigan case is, that the legislature had no power under the Constitution to pass a general incorporation law. The Constitution required that every act of incorporation should receive a two-thirds vote. It was held that this required every corporation to be created by special act.

Replying to an argument that an amendment to this general act, so held unconstitutional by recognizing existing associations formed under its provisions, might be regarded as specially creating corporations out of the associations so recognized, one of the judges expressed the *dictum*, not concurred in by the others, that the amendment could not be held to operate as a special creation, because, under his own construction of the Constitution and the practice of the legislature, the amendment might have been passed by a bare majority. It was not suggested that the court could inform itself by looking at the journals.

The New York case referred to, like all the other cases decided in the same State, not only does not sustain the Illinois court, but all its implications are to the contrary.

Later decisions in Illinois follow *Spangler v. Jacoby* with some dissent, or at least with some reservation of opinion on the part of individual judges. 17 Ill. 151. It should be noted also, that the case of *Spangler v. Jacoby* lacks the sanction of Judge TRUMBULL's concurrence. See note prefixed to the volume in which it is reported. See also 19 Ill. 288; 43 id. 97; 62 id. 253. In Minnesota the doctrine of the Illinois cases is carried a long step forward. There it is held (*Supervisors v. Keenan*, 2 Minn. 381), that a court will examine the legislative journals to see if a bill has been read three times before its final passage. The opinion in this case also totally ignores the English authorities, but cites a long list of New York cases, not one of which lends the slightest countenance to the doctrine asserted; and this illustrates its value as an authority.

In Alabama (*Jones v. Hutchinson*, 43 Ala. 721,) the point is decided in accordance with the doctrine of *Spangler v. Jacoby*, and it is decided solely on the authority of the Illinois cases which do sustain it, the New

York cases which do not sustain it, and the case of *Fowler v. Pierce*, 2 Cal., which had already been overruled by the able and elaborate opinion in *Sherman v. Story*, 30 Cal. 270. This total ignoring of the older authorities and reliance upon adverse and overruled cases, greatly impairs any authority the Alabama decision might have had.

In Arkansas (*Burr & Co. v. Ross & Leitch*, 19 Ark. 250), a public statute was set aside on the evidence furnished by the journal of the assembly that in that house the bill had been indefinitely postponed. This was done without any discussion of the question involved and upon the sole authority of the much-abused New York cases, which are here again made to do unwilling duty on the wrong side.

In South Carolina (*State v. Peatt*, 2 S. C. [N. S.] 150), a majority of the Supreme Court hold that a court will not only correct an enrolled act by comparison with the legislative journals, but that it will look beyond the journals to the original bill, and they hold also that they can set aside part of the law and uphold the balance. In this and other respects they go entirely beyond all precedent. They in fact ignore all precedent and attempt to sustain themselves by arguments drawn from the nature of courts and Constitutions in general, an attempt in which they seem to me to have signally failed, as is clearly shown in the able dissenting opinion delivered by the chief justice, in which the authorities are carefully reviewed.

In New Hampshire the judges of the Supreme Court have twice unanimously held, in official opinions delivered in response to inquiries from the governor and council, that enrolled acts of that State were invalid because the journal of one house did not show a concurrence in amendments adopted in the other. The authorities are not referred to in the opinions, but are collected in a note by the reporter, and seem to have been consulted; so that in one particular these decisions are entitled to more respect than most of those on that side. 35 N. H. 579; 52 id. 622.

In Indiana for a long time the Supreme Court, in *dicta* rather than decisions, indorsed the doctrine of the Illinois cases. See *Skinner v. Deming*, 2 Ind. 558; *Coleman v. Dobbins*, 8 id. 156; *McOullock v. State*, 11 id. 424.

But all these decisions, if they are decisions, are overruled by the late case above referred to, which exposes the absurdities into which the court has been led in following out the new doctrine.

In Michigan the Supreme Court was asked to declare a law inoperative, because, as was alleged, some of the members of the majority in the legislature by which the bill had been passed had not been legally

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elected. In other words, the court was asked to reinvestigate in this collateral proceeding the title of the members of the legislature to their seats. Of course the court held that upon that matter the action of the legislature was conclusive, and sustained the law. But without any occasion to do so, Judge COOLEY, who delivered the opinion, went out of his way to say that a printed statute is not even of *prima facie* validity when the journals show that some constitutional formality was wanting to its passage. And he, too, cites a list of the New York cases in support of this *dictum*. 13 Mich. 481. Judge COOLEY, as a text-writer, also lays down the same doctrine, and sustains the text by a similarly unfortunate citation of authorities. Cooley's Const. Lim. 135.

From this review it appears that the doctrine contended for has been upheld by decisions in six States and by *dicta* in one. But it also appears that most of the decisions are of slight authority.

But even if we admitted the correctness of the decision in *Spangler v. Jacoby*, upon the constitutional grounds upon which it is placed, it would not help the relator in this case, for it is there only held that the journals can be resorted to because for certain purposes they are made by the Constitution a record of as much sanctity as the enrolled laws. Here a reference to the journals alone shows no discrepancy between the enrolled act and the act passed. To discover the alleged discrepancy we must look further to a loose paper possessing no characteristic of a record. Our right to pursue the investigation to that extent is sustained by the South Carolina court alone, and that with a divided bench.

The Kentucky case to which we are referred (5 Bush, 680) notices the question, but does not decide it.

The decision of Judge THURMAN (3 Ohio St. 484), cited by Judge COOLEY, expressly waives the question; but so far as it is noticed, the argument is all against the doctrine which it is supposed to sustain.

As a set-off to Judge COOLEY's text, we would refer to a vigorous opinion of Attorney-General Black, quoted in a note to *Coleman v. Dobbins*, 8 Ind. 156.

From this discussion it appears that the decided weight of authority, as well as every consideration of expediency, is opposed to the doctrine that this, or any court, for the purpose of informing itself of the existence or terms of a law, can look beyond the enrolled act certified by those officers who are charged by the Constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted.

Man:lan.us denied.

STATE V. ROGERS.

(10 Nov. 250.)

Statute — enacting clause — omission of.

The Constitution prescribed a formal enacting clause to precede statutes. *Held*, that an omission of such clause or a part of it rendered a statute void.

APPPLICATION for a writ of *mandamus*. The opinion states the case.

Thomas Wren, for relator.

Robert M. Clarke and *H. O. Street*, for respondent.

HAWLEY, C. J. This is an application for a writ of *mandamus* to compel the respondent, the county recorder of Elko county, to transcribe and deliver to relator, the county recorder of Eureka county, certain records pursuant to the provisions of section 2 of the act entitled "An act to define and establish the boundary lines of Eureka county." Stat. 1875, 66.

Respondent claims that said act is unconstitutional and void. First, because it embraces more than one subject and because the subject of said act is not expressed in the title, as required by section 17, Article IV, of the Constitution, which provides that: "Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." Second, because said act has no enacting clause as required by section 23, Article IV, of the Constitution, which provides that: "The enacting clause of every law shall be as follows: 'The people of the State of Nevada, represented in Senate and Assembly, do enact as follows,' and no law shall be enacted except by bill."

The enacting clause of the act in question leaves out the words "Senate and " and reads: "The people of the State of Nevada, represented in Assembly, do enact as follows."

The first question to be determined is whether said provisions are directory or mandatory in their character.

In California, Ohio, Maryland and Mississippi, similar provisions of the Constitution have been held to be directory only. *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 id. 815; *Pim v. Nicholson*, 6 Ohio St. 177; *McPherson v. Leonard*, 29 Md. 386; *Swann v. Buck*, 40 Miss. 292. But in Alabama, Georgia, Indiana, Iowa, Kentucky,

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Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, Texas and Wisconsin, similar provisions have been recognized and enforced as mandatory by the courts, and in our judgment the whole current and weight of authority, as well as reason, is in accord with this view. The argument urged by relator, that we should follow the construction given by the Supreme Court of California prior to the adoption of our Constitution, has no force in its application to this case, from the fact that it cannot be said that we borrowed these provisions exclusively from the Constitution of the State of California, when similar provisions are to be found in the Constitutions of other States, where the courts had held them to be mandatory. This court has recognized and enforced section 17 as being mandatory (*State v. Silver*, 9 Nev. 230), and we see no valid reason for adopting a different rule in this case.

Judge COOLEY, in his work on Constitutional Limitations, after mentioning the fact that many of the provisions of the statutes of the several States have been held to be directory, says: "But courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a Constitution provisions which the people in adopting it have not regarded as of high importance and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and

measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions ; but they are at variance with the weight of authority upon the precise points considered, and we do not think, therefore, we should be warranted in saying that the judicial decisions, as they now stand, sanction the application." (p. 78.)

The following authorities fully sustain the position, which we believe to be correct, that these and similar provisions of the Constitution are mandatory. *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9 ; *Weaver v. Lapsley*, 43 id. 224 ; *Prothro v. Orr*, 12 Ga. 86 ; *Wolcott v. Wigton*, 7 Ind. 44 ; *Rice v. The State*, 7 id. 332 ; *The Indiana Central Railway Co. v. Potts*, id. 682 ; *Walker v. Caldwell*, 4 La. Ann. 297 ; *The Board of Supervisors of Ramsey Co. v. Heenan*, 2 Minn. 331 ; *State v. Miller*, 45 Mo 496 ; *The People v. Lawrence*, 36 Barb. 178 ; *The People ex rel. McConvill v. Hills*, 35 N. Y. 449 ; *Cannon v. Hemphill et al.*, 7 Tex. 185 ; *Antonio v. Gould*, 34 id. 49 ; *Durkee v. City of Janesville*, 26 Wis. 700 ; *Seat of Government determined*, 1 Wash. Ter. 186.

In *Tuskaloosa Bridge Co. v. Olmstead*, the court had under consideration the constitutional provision of Alabama that "No law * * shall be * * amended by reference only to its title, * * but the law * * amended shall itself be set forth at full length." It was there argued by eminent counsel that the provision was only directory, and was intended only as mere rules for the legislature, and that courts ought to "deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been its reason and spirit." Such is substantially the argument advanced by relator's counsel here, and the decision is for that reason specially applicable to this case. WALKER, C. J., in delivering the opinion of the court, said : "We have given careful attention to the argument that the clause of the Constitution under consideration is a mere rule of legislative proceeding, and does not render void a law not conformable to it. An anxious desire to allow effect to the will of the legislature, and to avoid a seemingly harsh visitation of a rule the usefulness of which is hardly proportionate to its inconvenience, induced us to prolong our advisement on the case, with the hope of discovering reason or authority which would lead us to the support of that argument. But it still seems to us that the clause raises a question of legislative power, and is not a mere rule for the government of the general assembly in its proceedings. The prohibition is emphatic, that no law shall be revised or amended except in the mode specified. This is a command, not specially or pro-

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fessedly addressed to the legislature alone. It is as general and comprehensive as any prohibition in the Constitution. It is binding upon the executive, who approves or disapproves bills, and upon the judiciary, who declare the law, as well as upon the legislature. What warrant can there be, then, for the position that it is simply a rule for the guidance of the legislature? When the Constitution says no law shall be amended, save in a specified manner, can the legislature say a law may be and shall be amended in a different manner? The case is, to our minds, a plain one of irreconcilable conflict between the paramount law of the Constitution and the enactment of the legislature. When such a conflict is clearly presented to the judicial mind, the Constitution must prevail." We approve of the reasoning and conclusion of the learned chief justice who delivered the opinion of the court. The reasoning of that case was afterward adopted and applied in *Weaver v. Lapsley*, where the court had under consideration the provision of the Constitution that declares: "Each law shall contain but one subject, which shall be clearly expressed in its title," and led the court "undoubtedly to the conclusion that the said section of the Constitution is imperative and mandatory, and a law contravening its provisions is null and void." If one or more of the positive provisions of the Constitution may be disregarded as being directory, why not all? And if all it certainly requires no argument to show what the result would be. The Constitution, which is the paramount law, would soon be looked upon and treated by the legislature as devoid of all moral obligations, without any binding force or effect; a mere "rope of sand," to be held together or pulled to pieces at its will and pleasure. We think the provisions under consideration must be treated as mandatory, and agree with Judge COOLEY that "there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives authority, and which ought, therefore, to be scrupulously observed and obeyed."

These provisions being mandatory in their character, it becomes our duty to consider whether they have been complied with.

Has this act an enacting clause, as required by the Constitution?

Cushing, in his work on *Law and Practice of Legislative Assemblies* (819, § 2102), says: "The Constitutions of all the States in the Union, except those of Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, Louisiana, Kentucky, and Arkansas, contain a statement, under the name of the enacting style, of the words with which every act of legislation in those States, respectively, must be in-

roduced, sometimes with and sometimes without the use of negative words, or other equivalent language. The Constitutions of the States above named, and of the United States, contain no statement of an enacting clause. Under those Constitutions, therefore, an enacting clause, though equally requisite to the validity of a law, must depend mainly upon custom. The foregoing considerations seem to call for three remarks :

“ 1. Where enacting words are prescribed, nothing can be a law, which is not introduced by those very words, even though others which are equivalent are at the same time used.

“ 2. Where the enacting words are not prescribed by a constitutional provision, the enacting authority must, notwithstanding, be stated ; and any words which do this to a common understanding are doubtless sufficient ; or the words may be prescribed by rule. In this respect much must depend upon usage.

“ 3. Whether, where enacting words are prescribed in a resolve or joint resolution, can such resolution have the force of law without the use of those very words, is a question which depends upon each individual Constitution, and which we are not called upon at present to settle.”

The question asked falls under the first subdivision discussed by Cushing.

In *McPherson v. Leonard*, *supra*, the majority of the justices of the court held that the words “ by the General Assembly of Maryland,” which were omitted from the enacting clause, were not of the essence and substance of a law, and that their use was directory only, and upon this ground refused to declare the act void. The statement that the words omitted are not of the essence and substance of a law is clearly erroneous, and the opinion is fallacious. How can it be said that these words are not of the essence and substance of a law when the Constitution declares that the enacting clause of every law shall contain them ? Two justices dissented from the opinion of the court and held the provision of the Constitution to be mandatory. Justice STEWART, in his dissenting opinion, said, in alluding to the Constitution : “ That instrument having expressly declared, in the twenty-ninth section of the third article, that ‘ The style of all laws of the State shall be, “ Be it enacted by the general assembly of Maryland,” ’ it is incumbent on the law-making department to pursue that mode. If a positive requirement of this character * * * can be disregarded, so may others of a different character, and where will the limit be affixed or practical discrimination made as to what parts of the organic law of the State are to be held as advisory, directory, or mandatory ? Disregard of the requirements

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of the Constitution, although, perchance, in matters of mere form and style, in any part, in law, may establish dangerous examples and should, in all proper ways, be discountenanced. The safer policy, I think, is to follow its plain mandates in matters that may appear not to be material, in order that the more substantial parts may be duly respected. If those who are delegated with the trust of making the laws, from the purest motives improvidently omit the observance of the Constitution under any circumstances, such oversight may be referred to in the future by others, with far different views, as precedents, and for the purpose of abuse. A higher responsibility is imposed upon those selected by the people for the discharge of legislative duty, and a greater obligation is demanded of them to exemplify, by their practice, a careful compliance with the Constitution. By a vigilant observance of its commands, the more reasonable is the probability that the best order will be secured. It is unnecessary to illustrate, by any argument, the soundness of this general consideration, which, I am sure, all will admit to be unquestionable, that a strict conformity is an axiom in the science of government. I certainly entertain such profound conviction of its truth, that I do not feel authorized to give my approval to this act as a valid law, but, on the contrary, am constrained to say that the omission of the style required by the Constitution is fatal to its validity." 29 Md. 392.

In Washington Territory, an act was passed without an enacting clause, to locate the seat of government, and although the "organic act" passed by Congress creating the Territory did not prescribe or require any enacting clause to be used in the passage of any law, the Supreme Court held the act to be unconstitutional and void for the want of an enacting clause. After quoting from Cushing, the court say: "The staring fact that the Constitutions of so many States, made and perfected by the wisdom of their greatest legal lights, contain a statement of an enacting clause in which the power of the enacting authority is incorporated, is, to our minds, a strong and powerful argument of its necessity. It is fortified and strengthened by the further fact that Congress, and the other States, to say nothing of the English Parliament, have, by almost unbroken custom and usage, prefaced all their laws with some set form of words in which is contained the enacting authority." 1 Wash. Ter. 143.

WYCHE, J., dissented from the opinion of the court, and in his dissenting opinion said: "The Constitutions of nearly all, if not of every State, prescribe some form for an enacting style, that is to say, some description of the law-making power. In such States it is conceded the prescribed forms must be followed, perhaps literally, at all events substantially."

He refers to *Washington v. Page*, 4 Cal. 388, where a provision of the Constitution was declared to be directory, and says it "is unsatisfactory and is not cited with approbation." He bases his dissent upon the ground that the "organic act" did not require an enacting clause, and that if the legislature was compelled to use any "enacting style from the force of custom, that custom must be unbroken," and shows that no such custom existed in the Territory. In *Swann v. Buck*, *supra*, the court discussed questions which belong to the third subdivision mentioned by Cushing. As an authority it has no application to the facts of this case, except in so far as the court held the law to be directory, a position which, in our judgment, for reasons we have already stated, is wholly untenable. The Constitution of Mississippi provides that the style of laws shall be: "Be it enacted by the Legislature of the State of Mississippi." The legislature passed a joint resolution in the following words: "Resolved by the Legislature of the State of Mississippi." The court, after admitting that it is necessary that every law should show on its face the authority by which it is adopted, held that the word "resolved" was as potent to declare the legislative will as the word "enacted," and further sustained the validity of the law upon the ground that as a joint resolution it had the force and effect of law.

In this case it is not contended that any equivalent words for those missing have been used, and there is no pretense that the act has the force or effect of law as a resolution. It is not necessary for us to hold, as laid down by Cushing, that nothing can be a law which is not introduced by the very words prescribed by the Constitution, for here there has not been a substantial compliance with the plain provision of that instrument. It is true, as was argued by relator's counsel, that all political power is inherent in the people. It is "the people" that enact all laws; but the laws, under the provisions of our Constitution, can only be enacted by the people when "represented in Senate and Assembly." These words, expressive of the authority which passed the law, are as necessary as the words, "the people," or any other words of the enacting clause. On its face the act purports to have been enacted by the people when represented in the assembly only. Without the concurrence of the senate the people have no power to enact any law. Every person at all familiar with the practice of legislative bodies is aware that one of the most common methods adopted to kill a bill and prevent its becoming a law, is for a member to move to strike out the enacting clause. If such motion is carried, the bill is lost. Can it be seriously contended that such a bill, with its head cut off, could thereafter by any legislative action become a law? Certainly not. The certificates of the proper off-

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cers of the senate and assembly, that such an act was passed in their respective houses, do not, and could not, impart vitality to any act which, upon its face, failed to express the authority by which it was enacted.

It was suggested by counsel for relator in his oral argument that when the bill was presented to the legislature, the enacting clause contained the identical words required by the Constitution, and that, after its passage, through the mistake of the enrolling clerk, the words "Senate and" were omitted. We decided in *The State ex rel. George v. Swift, ante*, that we could not look beyond the enrolled bill in the office of the secretary of State in order to ascertain the terms of a law. The correctness of that decision has not been questioned, and under the rules therein established we must take the act as we find it certified to by the officers whose duty it is to certify to the correctness of all laws that have been enacted. Our Constitution expressly provides that the enacting clause of *every law* shall be "The people of the State of Nevada, represented in Senate and Assembly, do enact as follows." This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people in their sovereign capacity to the legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and as this act comes to us without such authority appearing upon its face, it is *not a law*.

The conclusion here arrived at renders it unnecessary to decide whether the act in question is subject to the further objections, urged by respondent's counsel, that the subject of the law is not expressed in the title, and upon that point we express no opinion.

The writ of *mandamus* is denied.

EARLL, J., did not participate in the foregoing decision.

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(10 Nev. 388.)

Criminal law — verdict — failure to specify degree of crime — twice in jeopardy — new trial.

Upon the trial of an indictment for murder the jury returned a verdict of guilty, without specifying the degree. The statute divided murder into two degrees and provided that the jury should specify the degree. *Held*, (1) that the verdict was bad and that no judgment could be rendered on it; (2) that it being within the power of the

defendant to have had the verdict corrected when rendered, he is considered as consenting to it and as waiving objection to being tried before another jury.

INDICTMENT for murder. The opinion states the case.

M. S. Bonnefield and T. W. W. Davies, for appellant.

J. R. Kittrell, Attorney-General, for respondent.

EARLL, J. The defendant was indicted and tried in the District Court of the Fourth Judicial District, Humbolt county, for the murder of one Isaac N. Sharp.

The jury returned a general verdict as follows: "We, the undersigned jurors in the case of the State of Nevada against J. W. Rover, defendant, indicted for the murder of I. N. Sharp, do find the said defendant guilty as charged."

The defendant moved in arrest of judgment upon the ground that the verdict was insufficient, because it did not specify the degree of murder of which the jury found him guilty, and for his discharge from custody, because he had been once placed upon his trial on a valid indictment, before a competent court, and with a jury duly impaneled, sworn and charged with the case. The motion was overruled, and thereupon the court pronounced judgment of death against the defendant.

This appeal is from the judgment and also from the order denying the motion in arrest of judgment and to discharge the defendant from custody.

By section 17 of the act relating to crimes and punishments (Comp. L., § 2323), it is provided as follows: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." By this statute, murder is divided into first and second degrees, depending upon the particular circumstances in which the crime is committed, and whether it be of the first or second degree is a fact to be specially found from the evidence adduced, without reference

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to any special facts which may be stated in the indictment. In case of a trial, the jury before whom the trial is had, if they find the defendant guilty, are required to find this fact, and to *designate by their verdict* whether the guilt be of the first or second degree ; and in case of a plea of confession, the court is required to determine this question of fact by the examination of witnesses in open court. It is, therefore, apparent, from the plain and positive provisions of the statute, that a verdict which fails to designate the degree of murder of which the jury find the defendant guilty, is so fatally defective that no judgment or sentence can be legally pronounced thereon ; and this interpretation of the statute not only accords with its plain and positive language, but is supported by a long train of decisions in other States having statutes the provisions of which are similar to the one under consideration.

In the case of *Cobia v. The State*, 16 Ala. 781, the court say : “ We think it very clear that the verdict of the jury does not warrant the sentence pronounced by the court. The verdict finds the accused guilty in manner and form as charged in the indictment. So, if the defendant had plead guilty, or confessed his guilt, the record would only have shown that the prisoner was guilty of murder as charged, but in what degree would have been uncertain. In the latter case, however, the court could not have pronounced judgment, but it would have been necessary to impanel a jury to ascertain whether he was guilty of murder in the first or second degree, before sentence could have been pronounced against the prisoner. If the court cannot pronounce sentence against the prisoner on his plea of guilty as charged in the indictment, we do not see how sentence can be pronounced on a verdict of guilty as charged. The verdict only finds the facts charged to be true ; the confession of guilt would equally ascertain the same facts to be true ; but whether the accused was guilty in the first or second degree would be left equally uncertain whether he was found guilty by a jury, or confessed his guilt at the bar of the court.”

So in the case of *The State v. Moran*, 7 Iowa, 236, the Supreme Court of that State say : “ It is said, however, that the indictment charges the crime of murder in the first degree, and that when the jury by their verdict found the defendant guilty as charged in the indictment, they did, in legal effect, ascertain that he was guilty in the degree charged. This argument, however, leaves it to the court to deduce the intention of the jury from a verdict, general in its language, whereas the law requires that the jury shall find specifically the fact, whether guilt is of the first or second degree. When jurors find by their verdict that a prisoner is guilty, or guilty as charged in the indictment, it is not assuming too much to say,

that as a general thing they have simply found him guilty of a criminal homicide, without reference to the degrees of his guilt. And to say that upon such a verdict the court might properly conclude that they intended the highest offense, would be to presume against, instead of in favor of, human life." To the same effect are also the following decisions, rendered upon statutes nearly identical with the one under consideration: *People v. Marquis*, 15 Cal. 38; *People v. Dolan*, 9 id. 576; *People v. Campbell*, 40 id. 129; *State v. Dowd*, 19 Conn. 388; 3 Ohio St. 89; *Parks v. State*, id. 101; *McCauley v. The United States*, 1 Morris, 486; *Kirby v. The State*, 7 Yerg. 259; *McPherson v. The State*, 9 id. 279; *Thompson v. The State*, 24 Ark. 323; *Allen v. The State*, id. 333; *Ford v. The State*, 12 Md. 514; *Tully v. The People*, 6 Mich. 273; *McGee v. The State*, 8 Mo. 495; *State v. Upton*, 20 id. 400.

We might cite many other concurring decisions from the same and other States, but the above sufficiently manifest the uniformity of interpretation of the statute whenever its provisions have come under review. Indeed, the only decisions opposed to those above cited, which we have been able to find, are those of the Supreme Court of the State of Pennsylvania. In that State the court holds, that when the indictment charges the specific facts which, under the statute, constitute the crime of the first degree, that a verdict of "guilty in manner and form, as the prisoner stands indicted," does "ascertain" the murder to be of the first degree. The reason assigned is, "that the indictment is thus referred to as forming a part of the verdict, and the latter thus 'ascertains' the facts which in judgment of law amount to murder of the first degree." *Johnson v. Commonwealth*, 12 Harris, 389; *White v. The Commonwealth*, 6 Binn. 179; *Commonwealth v. Earle*, 1 Whart. 525. But if we apply the rule of these latter decisions to the case under consideration, and take into view both the verdict and indictment in order to determine the degree of which the jury intended to find the defendant guilty, we do not perceive how the court arrived at the conclusion that the jury intended to find the defendant guilty of the first degree, because the indictment contains none of the essential facts and circumstances which distinguish the first from the second degree, and is just as applicable to the one degree as it is to the other.

These Pennsylvania decisions, however, are not only opposed by the decisions of the courts of every other State having similar statutes, but seem to us to be contrary to the plain language and spirit of the act; and, in our opinion, the court is not authorized, in any case, to refer to the indictment in order to determine the degree of murder of which the jury find the accused guilty; but on the contrary, that the true intent

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and purpose of the act were to impose upon the jury the duty of *designating by their verdict* distinctly and unequivocally, the degree of the crime, and not leave it to be inferred or conjectured therefrom. It, therefore, follows that the verdict is fatally defective, and for that reason the judgment of the District Court should be reversed.

The defendant, however, does not ask this court to reverse the judgment and remand the cause for a new trial, but to reverse the judgment and order his discharge from custody.

If we understand the position of counsel for the defendant, it is, that while the court may reverse the judgment on account of the defective verdict, it has no power to order a new trial of the cause; because, it is claimed, by another trial the defendant would be put in jeopardy twice for the same offense; and in support of their position they rely mainly on the opinion of Mr. Justice STORY, 2 Sumner, 87, and the cases of *Commonwealth v. Cook et al.*, 6 Serg. & Rawle, 577; *Matter of Spier*, 12 N. C. 491; *Klock v. The People*, 2 Park. Cr. C. 676, and *The People v. Webb*, 38 Cal. 476.

In the case of *The United States v. Gibert*, Mr. Justice STORY argued at great length to show that, when a trial has been regularly had, before a court of competent jurisdiction, upon a good indictment, and a verdict has been regularly rendered by a competent jury, the party cannot be tried a second time. It was the opinion of the learned justice that the provision of the Constitution of the United States which adopts the maxim of the common law that a man shall not be twice put in jeopardy of life or limb for the same offense, presented an insurmountable barrier to a second trial, even upon the application of the defendant himself. But in the same case, Judge DAVIS, though he concurred in denying a new trial upon the merits, dissented from that part of the opinion which denied the power of the court to grant a new trial on the merits, upon the application of the defendant to reverse a verdict of conviction. Referring to that part of the argument of Mr. Justice STORY which rests the denial of a power in the courts of the United States to grant a new trial on the merits in a capital case, though at the request of a person convicted, on the fifth article of amendments to the Constitution, declaring that "no person shall be subject, for the same offense, to be twice put in jeopardy of life and limb," Judge DAVIS said: "That article in the amendments to the Constitution, corresponding to a rule of the common law, according to the prevailing spirit and character of those amendments generally, was doubtless intended for the security and benefit of the individual. As such it may be waived and relinquished. That the request of a prisoner for a new trial, affording a chance of escape from death to

which a previous conviction would assign him, should be rejected, from adherence to the letter of the rule, that his life would be again in jeopardy, would present an incongruity not readily to be admitted."

It will be observed that, in the opinion of Mr. Justice STORY, invoked in behalf of the defendant, he does not distinguish between the power of the court to grant a new trial, from the power to set aside the verdict, or to reverse the judgment, but denies that in capital cases the court has power to do either. On page forty-three of his opinion he says: "As soon as a capital case is fully committed to a jury, the life of the prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is, in the truest sense, put upon his deliverance from peril. When once the verdict is pronounced the case is fixed. If there is a verdict of acquittal, it is generally agreed that he cannot be put upon his trial again for the same offense. And why? Because it contradicts the direct language of this maxim of the common law. He would again be put in jeopardy of his life. And how does the case at all differ in principle in the case of conviction? The fact is the same. He is again put in jeopardy of his life. He is again to be tried and acquitted or convicted. If it be said that it is for his benefit and in favor of life to have a new trial, that may be true; but there is in the body of the maxim no such qualification or limitation of its meaning. It is nowhere laid down as a part of the maxim that if he is acquitted he shall not be tried again, but if he is convicted he may be allowed a new trial."

Thus, it will be perceived that the conclusion to which the learned justice arrived was, that the court possessed neither power to set aside the verdict nor to grant a new trial; that the verdict of the jury was final; but if errors should intervene in the progress of the trial, he was of opinion that the prisoner would not be without redress, because he could apply to the executive for a pardon or mitigation of the sentence. But this opinion of Mr. Justice STORY has come under review on frequent occasions in both the Federal and State courts, and we have been unable to find a single concurring opinion; but on the contrary, find many opposed thereto. In the case of *The People v. Morrison*, 1 Parker, 626, in which Mr. Justice HARRIS ably discusses the question of the power of the court to set aside a verdict and to grant a new trial, and referring to the opinion of Mr. Justice STORY, he says: "Indeed upon constitutional construction, Mr. Justice STORY stands alone. Not a judge of any court in the United States has been found to concur in his views."

In the case of *The United States v. Harding*, Wallace, Jr. 127, where three defendants had been jointly indicted for murder, and one had been convicted of *murder* and the other two of manslaughter, they all joined

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in an application for a new trial, which was granted, although the effect was again to expose them all to a conviction for murder. Kane, district judge, delivered the opinion of the court, in which Mr. Justice GRIER, of the Supreme Court of the United States, concurred. In referring to the opinion of Mr. Justice STORY on the question involved, he said: "I am aware that one of the most eminent of our jurists has found an inhibition in the Constitution against the grant of new trials in cases involving jeopardy. But I cannot realize the correctness of the interpretation which, anxious to secure a citizen against the injustice of a second conviction, requires him to suffer under the injustice of a first. Certainly I would not subject the prisoner to the hazards of a new trial without his consent. If, being capitally convicted, he elects to undergo the sentence, it may be his right, as it was to have pleaded guilty to the indictment. When, however, he asks a second trial, it is to relieve himself from the jeopardy in which he is already; and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue."

So, also, in the case of *The United States v. Keen*, 1 McLean, 429, Mr. Justice McLEAN, of the Supreme Court of the United States, emphatically repudiated the constitutional construction for which Mr. Justice STORY contended. "In favor of life," he says, "presumptions arise which seem to relax, and in fact sometimes do relax, the rigor of the law. But in the construction of the Constitution contended for, this maxim is reversed. The prisoner is found guilty by the jury, and, whether right or wrong, he must stand convicted. He claims, under the Constitution, a fair and impartial trial, and he shows gross prejudices against him by the jury who have convicted him on testimony wholly insufficient; but he is answered that the Constitution protects him from being put in jeopardy a second time for the same offense, and that a new trial would violate this provision. In other words, the Constitution guarantees to him the right of being hung, to protect him from the danger of a second trial. Whatever may be said theoretically of this constitutional protection, practically the subject of it can have no very strong reason to appreciate it."

It will be observed that in each of the cases above cited, the opinion of Justice STORY was urged as an authority against the prisoner's right to set aside the verdict, as well as against his right to a new trial. And, indeed, it is difficult to perceive how, in a case of conviction of a capital offense, it could ever be applied to the prisoner's advantage, because the whole theory of the argument is, that where the trial has been regularly had before a court of competent jurisdiction, upon a good indictment,

and a verdict has been regularly rendered by a competent jury, the verdict is final, notwithstanding the court may have committed errors in the progress of the trial, and notwithstanding, also, that the evidence may have been insufficient to justify it.

We do not deem it necessary to refer, in detail, to the other cases cited by counsel, because the facts upon which the decisions rest do not exist in the case under consideration ; and, in our opinion, they required an entirely different application of the constitutional provision involved. With the exception of *The People v. Webb*, the cases cited relate to causes in which the defendant had been put upon his trial, and, without his consent, the jury were discharged before they had rendered a verdict. For the purposes of this case it may be conceded that, as a general rule, when the jury has been sworn, and the prisoner has been put upon his trial, and the jury are discharged without his consent, before rendering a verdict, that he cannot be tried again ; though there are exceptions to the rule based upon urgent necessity. In the case of *The People v. Webb*, the defendant was tried and acquitted by the jury, and also discharged by the judgment of the court. The People having appealed, the court, following the almost universal current of authority both in England and in the United States, decided that the defendant having been once acquitted by the jury, he could not be held to answer again for the same offense, no matter by what mistakes or errors of the court, jury or prosecution the acquittal was obtained ; and the court also decided that the statute giving the right of appeal to the people, in criminal cases, must be confined to such cases in which errors in the proceedings may occur before legal jeopardy has attached to the accused. We see no analogy between the cases cited by counsel and the one at bar. No case is cited where the verdict of guilty having been set aside, at the instance of the defendant, it has been held to bar another trial.

Whatever may have been the opinion of some of the earlier judges of both the United States and some of the State courts, in respect to the correct interpretation and effect of the constitutional provision, which declares that "no person shall be subject to be twice put in jeopardy for the same offense," we think the rule is now well settled that, when the verdict is so defective that no judgment can be entered upon it, the defendant, who might have had it perfected when rendered, is considered as consenting to it, and as waiving any objections to being put to answer before another jury. Bishop, in treating of the doctrine of consent under this constitutional provision, states, as the result of the decisions on the subject, as follows : " Thus, if during the trial

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the jury is discharged with the prisoner's concurrence, his privilege to object is waived, and he may be tried anew. And when a verdict is so incomplete that no judgment can be entered upon it, the law infers the consent of both parties to it; because either party might have had it perfected when rendered; and, therefore, the prisoner may be put to answer before another jury. * * * And finally, whenever a verdict, whether valid in form or not, has been rendered on an indictment either good or bad, and the defendant moves in arrest of judgment, or applies to the court to vacate a judgment already entered, for any cause, as for many causes he may, he will be presumed to waive any objection to being put a second time in jeopardy; and so he may ordinarily be tried anew." 1 Bish. Crim. Law (3d ed.), § 844; *State v. Sutton*, 4 Gill, 494; *Sargent v. State*, 16 Ohio, 267; *Wilson v. The State*, 20 ib. 26; *Monroe v. State*, 5 Ga. 85; *State v. Hughs*, 2 Ala. 102; *Cabia v. State*, 16 id. 781; *Gerard v. People*, 3 Scam. 368; *People v. Olcott*, 2 Johns. Cas. 801; *People v. Casborus*, 13 Johns. 350; *Commonwealth v. Green*, 17 Mass. 515; *People v. Stone*, 5 Wend. 39; *Allen v. State*, 24 Ark. 388; *Gibson v. Commonwealth*, 2 Va. Cas. 111; *Commonwealth v. Smith*, id. 827; *People v. Olwell*, 28 Cal. 456; *United States v. Keen*, 1 McLean, 429.

It was, however, suggested at the argument, that even if no constitutional inhibition exists, the court has no authority to order the defendant to be tried again, because he did not apply for a new trial in the court below, but applied to be discharged from custody. The statute provides "that the appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial." 1 Compiled Laws, 529, § 488. It is thus apparent that whether a new trial is necessary or proper is a question for the court, and not for the defendant, to determine. In the language of CURREY, J., in the case of *The People v. Olwell*, *supra*: "If it be necessary or proper in the judgment of the court to make such order, its power is no-wise abridged because the defendant may fail or intentionally refuse to ask in terms for a new trial upon the reversal of the judgment. The court is to determine the question of necessity or propriety of ordering a new trial, and may exercise the power of making the order in such cases unless inhibited by the provision of the Constitution to which we have referred. The taking of an appeal from the judgment of conviction was a matter of the defendant's option. He had his choice to let the judgment stand and abide the consequences of it, or to move for its reversal in order to relieve himself from the jeopardy in which he was by reason of it. The appeal was taken on his behalf and for his benefit.

The verdict and judgment by which his life was in peril being annulled at his request, the same are as though they never had been, and he is not in a position to set up the former trial and conviction in bar of another trial. The reversal of the judgment at the defendant's instance on appeal, takes from him the right of setting up the former trial and conviction in bar of another trial, as effectually as if he had secured the same end by a motion for a new trial."

The judgment is reversed, the verdict set aside, and a new trial ordered.

STATE V. PICKETT, appellant.

(11 Nov. 255.)

Rape — assault with intent to commit — assent of female under twelve years.

Upon the trial of an indictment for rape committed upon a female within the age of twelve years, the defendant was convicted of an assault with intent to commit rape.

Held error, if what defendant did was with the female's actual consent.

An attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she is within the age of twelve years or not.

INDICTMENT for rape. The opinion states the case.

T. W. W. Davies and M. S. Bonnifield, for appellant.

J. B. Kittrell, Attorney-General, for respondent.

BEATTY, J. One of the assignments of error in this case is, in our opinion, well founded. The defendant was indicted for rape, and convicted of an assault with intent to commit rape. His motion for a new trial was overruled, and he was sentenced to fourteen years' imprisonment. The evidence adduced at the trial showed that the object of the supposed assault was a female under the age of twelve years, and in submitting the case to the jury, the court among other things charged them as follows: "If the female is under the age of twelve years, she is deemed incapable of consenting to any carnal intercourse, and the legal presumption that any such cruel knowledge is forcible and against her will is conclusive. If the jury believe from the evidence that the defendant is over fourteen years of age, and that the girl known as Caroline Davis is

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under the age of twelve years, and at the time and place charged in the indictment, the defendant did have carnal knowledge of her by penetrating her body, he is guilty of rape. * * But if the jury believe that the defendant attempted to commit a rape and failed to effect a penetration, as above described, they should find a verdict of guilty of assault with the intent to commit rape." To the giving of this charge the defendant excepted; and he argues that it was erroneous, for this reason: that the jury was thereby instructed that upon proof of an unsuccessful attempt to have carnal knowledge of the girl, he might be convicted of an assault to commit rape, although every thing he did was with her actual consent — the law being, as he contends, that an attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she be within the age of twelve years or not.

When the proposition was stated on the oral argument of the case, I was strongly inclined to consider it untenable, and to hold that the charge of the district judge was correct, but after examining the cases relating to the subject, I am convinced that the weight of reason and authority is on the side of the appellant.

The common-law definition of rape is "the carnal knowledge of a woman forcibly and against her will." 4 Bl. Com. 210. The same definition is adopted by our statute. Comp. Laws, § 2350. Under this definition, an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. As an assault implies force and resistance, the crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female.

This is well settled in England, where, under the provisions of several statutes, the carnal knowledge of a female under ten years of age, with or without her consent, is made a "felony." The statutory crime is not there denominated "rape," and the English judges have escaped the confusion of ideas which in this country has no doubt arisen from the fact that two essentially different crimes have been called by the same name, leading our courts, in some instances, to attribute to the statutory

rape all the qualities of common-law rape. Thus in the case of *Hays v. The People*, 1 Hill, 352, where the precise question here involved was under discussion, Judge COWEN, delivering the opinion of the court, said: "The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor any more than if he had consummated his purpose." And this construction was afterward adopted by the Supreme Court of Michigan in the case of *The People v. McDonald*, 9 Mich. 150. The New York case was decided in 1841, and no reference was made to several cases then recently decided in England, by which a different construction had been given to a statute substantially the same as that of New York. The court was probably not aware of those decisions. The Michigan case was decided twenty years later, but the court took no notice of the English decisions, though they were referred to on the argument. There may be other cases which sustain the same view, but if so, they have escaped our attention. On the other hand, there is a still later case decided by the Supreme Court of Ohio (*Smith v. The State*, 12 Ohio St. 466), in which an opposite conclusion is reached after a full discussion of the question and elaborate review of the authorities. The reasoning of this decision appears to us entirely satisfactory, and it is sustained by the authority of some of the most eminent of the recent English judges. See *Reg. v. Martin*, 9 C. & P. 218; *Reg. v. Meredith*, and *Reg. v. Banks*, 8 id. 589, 575; *Reg. v. Read*, 2 Car. & Kirw. 957, and 1 Dennison's Crown Cases, 377, and note to page 379.

We are not, however, forced to the conclusion reluctantly accepted by the Ohio court, that our law provides no punishment for an attempt to have carnal knowledge of a consenting child within the age of twelve years. Our statute, so far from abolishing the common-law rule that an attempt to commit a felony is a misdemeanor, has enlarged that rule and made specific provision for the punishment of attempts to commit offenses of every grade. C. L., § 2464. By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of "assault with intent," etc., in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape. It is quite possible, if this distinction had been drawn in the instructions to the jury, that the defendant would only have been convicted of the attempt, for which the extreme punishment is ten years' imprison-

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ment. C. L., § 2464. Whereas, the "assault with intent," etc., of which he was convicted, may be punished by fourteen years' imprisonment, and the defendant actually received that sentence. C. L., § 2868.

The judgment is reversed and cause remanded for a new trial.

QUIGLEY v. CENTRAL PACIFIC RAILROAD COMPANY, appellant.

(11 Nev. 350.)

Removal of suits to federal courts — removal by corporation.

An officer of a foreign corporation sued in a State court cannot (at least without special authority) make the affidavit required by the act of Congress of 1867, for the removal of the suit to the United States Circuit Court, as that act requires an affidavit of the defendant's own belief.

ACTION to recover damages. The opinion states the case.

T. B. McFarland, for appellant.

James Seeley, for respondent.

HAWLEY, C. J. This action was brought by plaintiff Quigley to recover from the defendant, the Central Pacific Railroad Company, damages for an alleged unlawful ejection from defendant's cars.

The jury found a verdict in favor of plaintiff and assessed the damages at \$5,000. Defendant moved for a new trial, which was refused. The appeal is taken by defendant from the judgment, and from the order of the District Court overruling its motion for a new trial.

Prior to the trial of the case the defendant moved the court to transfer the suit to the Circuit Court of the United States for the district of Nevada, in pursuance of the provisions of the amendatory act of Congress, "approved March 2, 1867," which provides: "That where a suit * * may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State

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court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court, and it shall be, thereupon, the duty of the State court to accept the surety and proceed no further in the suit." 14 U. S. Stat. at Large, 558. The petition and bond filed by appellant state the facts as required by the act. The petition is signed "Central Pacific Railroad Co., by E. H. Miller, Jr., Secretary," and by the attorneys for defendant. The bond is signed "Central Pacific Railroad Co., by E. H. Miller, Jr., Secretary," and by two sureties. A seal, purporting to be the seal of the corporation, is affixed to the petition and bond. The affidavit is as follows :

"[Title of court and cause.]

"State of California, City and County of San Francisco, ss.

"Charles Crocker being duly sworn, deposes and says : That he is the second vice-president of the Central Pacific Railroad Company, the defendant in the above-entitled action ; that Leland Stanford is the president of said company, and Collis P. Huntington is the first vice-president of said company ; that said Stanford and Huntington are at the present time in the city of New York, and therefore unable to make this affidavit ; that said Central Pacific Railroad Company is a corporation duly organized under the laws of the State of California, having its principal place of business at the city and county of San Francisco, in said State, and is the defendant in the above-entitled action : that said action was brought on or about the fourth day of April, 1874, in the above-entitled court, * * * that said plaintiff * * * is and has been since the nineteenth day of August, A. D. 1874, a citizen of the United States residing in the State of Nevada. And this deponent further says : That he has reason to believe, and does believe, that from prejudice and local influence, said defendant corporation will not be able to obtain justice in said court, and affiant therefore makes this affidavit for the purpose of removing said suit into the Circuit Court of the United States for the district of Nevada, * * in pursuance of the statute in such case made and provided, and further saith not.

"(Duly verified.)

CHARLES CROCKER."

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The plaintiff objected to the sufficiency of the petition, bond, and affidavit. The objections to the petition and bond were made upon the ground that they were not signed by the defendant, and contained no evidence that E. H. Miller, Jr., was authorized by the defendant to sign the same; and the further ground that the seal thereto affixed was not attested, nor in any manner authenticated as the seal of defendant. The objection to the affidavit, as made in the court below, reads as follows: "Third. That one of the grounds for renewal of said cause, as stated in said pretended petition, is that one Charles Crocker has reason to believe, and does believe, that from prejudice and local influence, said corporation will not be able to obtain justice in said court. *That said affidavit is the mere opinion of said Charles Crocker, and does not show that such is the opinion of the defendant; nor does said affidavit show that said affiant has any authority from defendant to make such affidavit; nor does said affidavit or petition set forth any grounds or reason upon which this court can judicially determine that either bias or prejudice exists in the county of Elko against defendant.* Fourth. That said pretended affidavit is without any seal of defendant authenticating said affidavit as being the averment or statement of defendant." The objections to the petition and bond are not well taken. As they were virtually abandoned by respondent's counsel it is unnecessary to further notice them. In the oral argument, counsel for respondent relied upon the objections to the affidavit which we have italicised. It was admitted that if the application conformed to the provisions of the act, the existence of local prejudice need not be shown; and it was so decided in *Meadow Valley Mining Company v. Dodds*, 7 Nev. 143; S. C., 8 Am. Rep. 709. The act of Congress only requires the person making the affidavit to state the fact. No reasons therefor need be assigned, as the question whether such bias or prejudice exists is not left to the judicial determination of the court. The act of Congress is plain and imperative, and leaves nothing to be construed. When the petition, bond, and affidavit are filed as required by the act, it positively declares that it shall be the duty of the State court to accept the security and proceed no further in the suit. Is the affidavit in other respects sufficient? Must the authority to make the authority be affirmatively shown? The questions presented by the objections are raised for the first time in this State, and are of great importance. No authorities bearing upon the points were cited by counsel on either side, and but few could be found which add any light to the answers that must be given to the questions we have propounded. A corporation cannot, from the very nature of its existence, make the affidavit in person. It has no mind, no reasoning faculties; no power to

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think, speak, or act, except through its officers, agents, servants, and employees. In what manner, then, can the corporation, if at all, make such an affidavit as will be sufficient to authorize the removal of a cause under the act of Congress under consideration.

In the case of *The Meadow Valley Mining Company v. Dodds*, *supra*, the affidavit was made by the superintendent of the corporation, and LEWIS, C. J., in delivering the opinion of the court, said: "The application in all respects conformed to the provisions of the act;" but the point here urged was not there relied upon, and hence the remark quoted cannot be considered as an authority in favor of the sufficiency of the affidavit. An examination of that case shows that it was there admitted that the affidavit was "sufficient in all respects, except that it does not set out the facts upon which the appellant bases his belief that such local prejudice existed that he could not obtain justice." This, together with the constitutionality of the act, were the only questions considered and passed upon by the court. As the act of Congress takes from the State court the power to judicially determine whether or not any local prejudice exists that would prevent the moving party from obtaining justice, it ought to be strictly construed. "The character of the act, its object, and its effect upon litigation in the State courts," as was said by the Supreme Court of New York, "is not such as to call for a liberal construction of its privileges. On the contrary, it should be strictly construed, and a party seeking to avail himself of its privileges must come clearly within its provisions." *Cooke v. The State National Bank of Boston*, 1 Lans. 501. In this case, the question whether a corporation could make the affidavit was referred to, but not decided. INGRAHAM, J., in delivering the opinion of the court, said: "There is also one objection made to the fact, that the statute does not apply to a corporation, because a corporation cannot make the affidavit required, and the belief of other persons than the defendant is not a compliance with its provisions. The objection is not without weight; and it may well be doubted whether an affidavit, made by one or more of the directors, is a compliance therewith; but it is unnecessary to decide on that question." This *dictum* was expressed in a case where the affidavit for removal was made by the president and nine directors of the corporation. The language of the affidavit being: We also, each for himself, severally do declare, and upon oath say, that we have reason to believe, and severally do believe, that from prejudice and local influence, the said State National Bank of Boston will not be able to obtain justice in the said suit in the said State court." This cause was taken up to the Court of Appeals, and CHURCH, C. J., in delivering the opinion of the court, upon this point, said: "The last

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objection to the validity of the removal is, that a corporation cannot avail itself of the act of 1867 by reason of its incapacity to make the affidavit required by the act. It is urged by counsel that this act confers upon one party extraordinary power over the litigation, enabling it, by an *ex parte* oath of mere belief of the existence of a fact, which cannot be contradicted, and after having the benefit of all the 'law's delay' in the State court, to remove the suit to another court, and that it should be strictly construed, and hence that it should be held to apply to such a party only as is capable of entertaining and expressing a belief, and that the affidavit can in no case be made by any other than the party himself. There is a difference of opinion among the members of the court upon the point; and upon consultation we have concluded, as probably the most conducive to the interests of both parties in facilitating the final disposition of the case, to sustain the objection, and hold that it was not removed." *Cooke v. State National Bank of Boston*, 52 N. Y. 114; S. C., 11 Am. Rep. 667.

We think this case goes too far. It is now too well settled to be questioned, that a corporation is a citizen of the State where it is created, and it certainly can be a "citizen of another State" within the meaning of the words as used in the act of 1867. If it is a citizen of another State, by presenting and filing the necessary papers, it would certainly be entitled to have the suit removed. True, the corporation could not, in person, make the affidavit. But, suppose the board of directors at a regular meeting should pass a resolution declaring that the corporation has reason to, and does believe that, from prejudice and local influence, it will not be able to obtain justice in such State court, and authorizes its president, or some other person, to make and file an affidavit of this fact in said court, would this not be sufficient? We think it would. Whether it is absolutely necessary that the authority of the corporation should be given in the manner here indicated need not be determined in this suit. The objection we are considering is based upon the ground that the affidavit, as to the belief, is the mere opinion of Charles Crocker, and not the opinion or belief of the defendant, and our conclusion is that this objection is well taken. We are also of opinion that the authority from the corporation to make the affidavit must, in some manner, affirmatively appear. In *Mahone v. Manchester and Lawrence Railroad Corporation*, which was a suit brought to recover damages for an injury sustained by plaintiff while a passenger in the cars of defendant, the corporation moved for a transfer of the cause from the State to the Federal court, under the same act of Congress. The affidavit was by the acting and assistant superintendent of the defendant, and the objection here presented was there made

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and held to be good. The opinion was by a full bench. GRAY, J., in delivering it, after referring to the fact that the act had been declared constitutional, and that, in order to authorize a removal, the requirements of the act must be strictly and fully complied with, said: "Among the conditions which the act of Congress imposed upon the removal of the case, are that 'such citizen of another State' shall file a petition for the purpose, and that 'he will make and file' in the State court 'an affidavit that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.' The act of Congress does not, like our statute for the removal of actions from the Superior Court upon application of the defendant to this court for trial, authorize the affidavit to be made by the party or by any person in his behalf. * * * Congress may well have thought it not too great a security against abuse of the power of removal, to require the party's own affidavit to a fact of such a nature, and of which no further proof is to be made at any stage of the proceedings. Whatever may be the reasons, the words of the statute are explicit, and require the affidavit, as well as the petition, to be the act of the party. *Anon.*, 1 Dillon, 298, note; *Herschfeld v. Clarke*, 11 Exch. 712. When, as in this case, the petitioner for removal is a corporation, the petition may doubtless be signed and the affidavit made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear." 111 Mass. 72; S. C., 15 Am. Rep. 9.

It might be urged that inasmuch as no officer of a corporation, unless specially authorized, has power to bind the corporation except in the discharge of his ordinary duties, and inasmuch as it is no part of the ordinary duties of the superintendent of a railroad to represent the corporation in judicial proceedings, that a distinction ought to be drawn between the case referred to and the one under consideration, where the affidavit is made by the acting president, who is at the head of the corporation, and invested with greater power than any other officer. This question was mooted in the Massachusetts case, and the language we have quoted from the opinion may be considered as modified to some extent, from the fact that it appeared from the bill of exceptions in that case "that Hildreth, by whom the petition for removal was signed, and the affidavit in support thereof made, had no authority except what was incident to his office as assistant and acting superintendent of the defendants," and for this, as well as the other reasons given in the opinion, it was held, "that the petition and affidavit were not the acts of the corporation." But from the view we take of this question and the gist of the objection made and authorities cited, this distinction as to the ordinary duties of the respect-

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ive officers of a corporation makes no difference. The objection is, that the individual belief of an officer or agent of a corporation does not answer the positive requirements of the statute. The affidavit must be made by the party to the suit. It is the belief of the "citizen of another State," not the belief of such citizen's agent, that deprives the State court of its jurisdiction. As the affidavit in this case did not conform to the requirements of the act of Congress the court did not err in proceeding with the trial of the case.

[The remainder of the opinion was devoted to a consideration of defendant's liability and the measure of damage.]

BEATTY, J., concurred in the ruling that the affidavit was insufficient, but doubted "if the course suggested as the proper one to have been pursued would have brought the corporation defendant within the terms of the act of Congress." In other words, he was of opinion that a corporation could not avail itself of the act.

EARLL, J., having been of counsel, did not sit.

CASES
IN THE
S U P R E M E C O U R T
OF
MINNESOTA.

STATE v. KENT, appellant.

(22 Minn. 41.)

Embezzlement — title to property — interest of defendant.

Under a statute making it larceny to embezzle "any money or property of another," held that the money or property embezzled must be *entirely* the money or property of *another* and that, therefore, if the accused have an interest in any part of it, he cannot be convicted of embezzlement under the statute.

INDICTMENT for embezzlement. The defendant was convicted and appeals.

Erwin & Piece, for appellant.

Geo. P. Wilson, Attorney-General, and *C. D. O'Brien*, for State.

BERRY, J. Section 23, ch. 95, Gen. Stats., enacts that "if any officer, agent, clerk, or servant, of any incorporated company, or if any clerk, agent, or servant, of any private person, or of any copartnership, * * * embezzles, or fraudulently converts to his own use, * * * without consent of his employer or master, any money or property of another, which has come to his possession or is under his care, by virtue of such employment, he shall be deemed to have committed larceny." To sustain an indictment under this section of the statute, the money or property charged to have been embezzled, or fraudulently converted, must be the money or property of another than the person indicted.

The defendant was collector of pew rents for a church corporation,

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and acted as such, under a special and express agreement, by which, as compensation for his services, he was to have "five per cent of all the pew rents, no matter who collected them." The effect of this agreement was to vest in defendant an undivided one-twentieth interest in the rents collected, and to that extent to make him an owner of the same jointly with the corporation. In other words, the rents collected were not the money or property of the corporation, but the joint property of the corporation and the defendant. They were, therefore, not the property of *another* than the defendant. It follows that the defendant is not properly indictable, under the section of the statute before cited, for his alleged embezzlement and fraudulent conversion of the same, or any part thereof. *Holmes' case*, 2 Lew. 256, cited 2 Archbold's Cr. Pr. & Pl. 569, note; *Reg. v. Bren*, cited 2 Bish. Cr. Law, § 825, note 8; *Rex v. Hoggins*, Russ. & Ry. 145; *Com. v. Stearns*, 2 Metc. 848, 849; *Com. v. Libbey*, 11 id. 64; *Com. v. Foster*, 107 Mass. 221; 2 Bish. Cr. Law, §§ 855, 856.

This conclusion practically disposes of the case in defendant's favor. Were it necessary for us to pass upon the other points presented on the argument, we should be much inclined to doubt whether, independent of the agreement, the course of dealing between the corporation and the defendant, by which the former acquiesced in his practice of depositing the rents collected, on his own general account, and of treating the deposits as his own, was not such as to divest the corporation of its specific property in the deposits, and to establish between it and the defendant the simple relation of creditor and debtor. See *Com. v. Libbey*, 11 Metc. 64; *Com. v. Stearns*, 2 id. 848. If this doubt be well founded, the result would be the same as that before reached upon the construction of the agreement.

Judgment and order refusing new trial reversed.

STATE V. CASSIDY.

(22 Minn. 312.)

Constitutional law — taxation of liquor dealers — police power.

A statute provided that all liquor dealers should take out a special license in addition to all other licenses required by law, and should pay therefor ten dollars, and that the money so received should constitute a fund for the foundation and maintenance of an asylum for inebriates. *Held*, that the act was within the police power of the legislature and not in violation of the constitutional provision against unequal taxation.

PROSECUTION for selling liquor without the license required by the statute quoted in the opinion. The defendant was convicted before a justice of the peace and the conviction was affirmed by the District Court. Defendant appealed.

R. A. Jones, for appellant.

Chas. O. Wilson and Chas. M. Start, for State.

CORNELL, J. The sole question presented for consideration in this case relates to the constitutionality of Laws 1873, ch. 10, entitled "An act to establish a fund for the foundation and maintenance of an asylum for inebriates." Its unconstitutionality is rested on the ground that it imposes a specific tax upon a class of persons engaged in a particular business, and is, therefore, in conflict with § 1, art. 9, of the Constitution, which requires that "all taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State." It is admitted that the State, through the exercise of its police power, has an undoubted right to prescribe all needful rules and regulations in respect to the traffic in spirituous liquors, and that, if the act in question is a proper and legitimate exercise of that power, it is not a violation of the constitutional requirements of equality and uniformity in the imposition of taxes. It is strenuously denied by the defendant, however, that the law under consideration is one of this character. It is argued that its object is, as indicated by its title, the creation of a fund for a specific purpose, and that, therefore, it is not an act to regulate the sale of intoxicating liquors, and cannot be held to be an exercise of the police power. If, however, such is not its purport and meaning, then its title is a misnomer, and the law must fail because of its repugnancy to art. 4, § 27, of the Constitution, which provides that "no law shall embrace more than one subject, which shall be expressed in its title." As the title indicates one thing, and the body of the act another and different thing, the law itself is a nullity. This, in brief, it is believed, is a fair statement of the argument and grounds upon which the invalidity of the act is rested.

Section 1 of the act provides that "all keepers of saloons, groceries, restaurants, drug stores, wholesale or retail liquor stores, hotels, breweries, or other places where spirituous, vinous or malt liquors are sold or kept for sale within this State, shall, before they shall be permitted to sell or dispose of such spirituous, vinous or malt liquors, take out, or

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cause to be taken out, a special license (in addition to any and all other license or licenses which they are or may be required, by any law, ordinance, or municipal regulation, to take out), paying therefor the sum of \$10 to the county treasurer of the proper county ;” and it further provides for the issuing of such license by the county auditor of the county wherein the business so licensed is transacted, which shall be good for one year. The next three sections provide for setting apart in the State treasury all moneys received from the issuing of such licenses, as a separate fund, to be known as the “State Inebriate Asylum Fund,” and devoting the same exclusively to the establishment and maintenance of a State asylum for inebriates. Section 5 makes it a misdemeanor for any one to sell or otherwise dispose of any such liquors without license, and prescribes a punishment by fine for every such offense.

It is very apparent from these provisions that the law, in effect, is one further regulating the traffic in intoxicating drinks. Such is manifestly one of its objects, and its principal features and provisions accord with this idea. It requires of those desiring to prosecute the business the procuring of a special license as a condition precedent to the exercise and enjoyment of such right. It regards the traffic as one tending to produce intemperance, and as likely, by reason thereof, to entail upon the State the expense and burden of providing for a class of persons rendered incapable of self-support, the evil influence of whose presence and example upon society is necessarily injurious to the public welfare and prosperity, and, therefore, calls for such legislative interposition as will operate as a restraint upon the business, and protect the community from the mischiefs, evils, and pecuniary burdens flowing from its prosecution. To this end the special license is required, and the business restricted to such persons as are willing to indemnify the State, in part, against such its probable results and consequences, by contributing toward a fund that shall be devoted exclusively to that purpose in the manner indicated in the act. That these provisions unmistakably partake of the nature of police regulations, and are strictly of that character, there can be no doubt, nor can it be denied that their expediency or necessity is solely a legislative, and not a judicial, question. *City of St. Paul v. Colter*, 12 Minn. 41, 48 ; *Fire Dep't of Milwaukee v. Helfenstein*, 16 Wis. 136 ; *Tenney v. Lenz*, id. 556.

Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon the traffic, and as a protection to society against its consequent evils, the exacted fee is not unreasonable in amount, and the purpose to which it is devoted is strictly pertinent and appropriate. It could not be questioned but that a reasonable sum imposed in

the way of an indemnity to the State against the expense of maintaining a police force to supervise the conduct of those engaged in the business, and to guard against the disorders and infractions of law occasioned by its prosecution, would be a legitimate exercise of the police power, and not open to the objection that it was a tax for the purpose of revenue, and, therefore, unconstitutional. Reclaiming the inebriate, restoring him to society, prepared again to discharge the duties of citizenship, equally promotes the public welfare, and tends to the accomplishment of like beneficial results, and it is difficult to see wherein the imposition of a reasonable license fee would be any the less a proper exercise of this power in the one case than in the other. The purpose to which the license fund created by the act is designated is more consonant to the idea of regulating the traffic and preventing its evils than is the case under the general license law, which devotes the fees received to common school purposes, and we are not aware that any objection has ever been urged against that law on that account. In the case of *City of St. Paul v. Colter*, 12 Minn. 41, this court upheld an ordinance regulating and licensing butchers' shops, etc., which fixed the license at \$200, and sustained the action of the legislature in giving to the common council the power of prescribing what sum should be paid for each such license, provided it was not less than \$5, nor more than \$500; and in regard to the point made in that case, that such license fee was for the purpose of a revenue, the court observed that "it was not all important whether the license produced a revenue to the city or not." So in *City of Rochester v. Upman*, 19 Minn. 108, "the licensing and regulation of the dangerous traffic in intoxicating liquors" was recognized and approved as "an almost universal mode of exercising the police power," and "the objection that the license fee was unconstitutional, as imposing an unequal tax," was declared to be "fully met by the consideration that the license was imposed, not as a tax, but as an incident — and, in the opinion of the law-making authority here and elsewhere, a just and reasonable incident — of the exercise of the police power."

These cases are decisive of the present, unless the law must fail by reason of its alleged defective title in not indicating with sufficient certainty its subject, which, by the Constitution, is required to be expressed in the title.

[The court held that the title was sufficient.]

Judgment affirmed.

BERRY, J., dissented from the foregoing part of the opinion.

State v. Lee.

STATE v. LEE.

(22 Minn. 407.)

Evidence of character in criminal cases — negative evidence — disposition.

Negative evidence of character is competent ; for instance, the testimony of a witness who swears that he has been acquainted with an accused person for a considerable time, under such circumstances that he would be more or less likely to have heard what was said about him, and has never heard any remark about his character — the fact that a person's character is not talked about at all being excellent evidence that he gives no occasion for censure, or, in other words, that his character is good. The disposition of a person may be proved as a fact by a witness who knows what the disposition in question is from his own personal observation.

APPEAL by defendant from a judgment of the court of Common Pleas of Ramsey county, where the prisoner was tried on an indictment for rape, convicted, and sentenced to imprisonment in the State prison for thirty years.

W. A. Gorman and I. V. D. Heard, for appellant.

Geo. P. Wilson, Attorney-General, for State.

BERRY, J. The defendant was indicted for the commission of a rape. Upon the trial "the prosecuting witness testified, among other things, that the defendant, in the commission of the offense charged in the indictment, committed a violent assault and battery upon her, and threatened to take her life, before he committed the alleged offense, and testified she was sure that the defendant was the person who committed the offense. The defendant testified in his defense that he did not commit the alleged offense, and was not present at the time it was committed, but was in another part of the city at the time, * * * and that he never saw the prosecuting witness * * * until several days after * * * she alleged the offense was committed."

The defendant called as a witness one Hopkins, who testified as follows: "Know defendant; first saw him nearly two years ago; he worked at the driving park in this county. I think I am acquainted with defendant's general character for peaceableness." On preliminary cross-examination by the prosecuting attorney the witness testified as follows: "Never heard his character spoken of by any one before this transaction." On behalf of defendant the witness was asked the following questions, viz.: 1. "What was defendant's character as to peace and

quietness?" 2. "What was defendant's disposition as to peace and quietness?" Both questions were excluded by the court upon objection by the prosecution.

Several other witnesses were asked similar questions (also excluded), but none of them appear from the testimony to have been acquainted with the defendant's character for peace and quietness (using the word "character" in the sense of reputed character, or reputation), so as to qualify them to testify to the same, though some of them showed more or less knowledge of defendant's disposition.

Defendant also proposed, in the language of the record, "to call other witnesses, who had been acquainted with defendant for about two years but who had never heard his character, disposition, or reputation discussed or spoken of, and to prove by them that his disposition for peace and quietness was good; also that his character for the same was good, and also that his general reputation for the same was good; but the court held that neither of the above could be shown unless the witnesses would testify that they heard the defendant's character or disposition for peace and quietness discussed or spoken of."

By the strict and technical rule, as laid down by the text-writers, the only evidence of his good character which an accused person is permitted to adduce upon his trial for a criminal offense is evidence of general repute. In practice, however, the rule is seldom strictly enforced, but is in fact much and often relaxed. 1 Taylor's Ev., § 325 *a*; *Regina v. Rowton*, 2 Bennett & Heard's Cr. Cas. 333, *et seq.*, and note; *Gandolfo v. State*, 11 Ohio St. 114; 1 Bishop's Cr. Prac., § 489. A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative evidence of good character — as, for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and has never heard any remark about his character — the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good. *Regina v. Rowton*, 2 Bennett & Heard's Cr. Cas. 333; *Gandolfo v. State*, 11 Ohio St. 114. In enforcing the strict rule, without regard to this relaxation of it, we think the court below erred. The witness Hopkins testified — and it must be assumed that the witnesses whom defendant proposed to call would have testified — to an acquaintance with defendant for a considerable time, under circumstances in which his bad reputation (if such he had) would have been more or less likely to have come to their knowledge. They should have

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been permitted to testify negatively to his good character by testifying, in effect, that they never heard his character discussed or spoken of.

This brings us to the offer of testimony in regard to defendant's disposition as to peace and quietness. The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged. 1 Taylor's Ev., § 325; *Regina v. Rowton*, per EARLL, C. J., and MARTIN, B.; 1 Wharton's Am. Cr. Law, § 636. This presumption does not rest upon the ground that, in *general repute*, the accused possesses a disposition which would render it unlikely that he would commit the crime, but upon the fact that he *possesses* the disposition—a fact of which general repute is only evidence. As it is, then, the *fact* of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition in question is from his own personal observation. If it could properly be objected that the latter kind of testimony would be matter of opinion, a like objection might be made to evidence of general repute as but an aggregation of opinions. But evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense. It is evidence of a fact—just as much evidence of a fact as is evidence of the disposition of a horse. Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient, or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both."

Judgment reversed and the case remanded for a new trial.

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ABATEMENT.

Effect of death pending appeal.] In an action to recover for personal injuries the plaintiff had judgment which was reversed by an intermediate court of appeal; and he then took an appeal to the court of last resort; and while this was pending he died. *Held*, that the action was not abated. *Louis v. St. Louis, etc., R. R. Co.* (Mo.), 885.

ACCEPTANCE.

Of bill of exchange.] See NEGOTIABLE INSTRUMENTS, 517.

ACCESSORY.

See CRIMINAL LAW, 459.

ACKNOWLEDGMENT.

Certificates of, when conclusive.] See DEED, 46.

ACTION.

1. **When tort will lie for damages arising from contract.]** Defendant had by contract the right to float logs through plaintiff's dam, and was bound by the same contract to repair and pay all damage done by him. *Held*, that he was also liable to trespass on the case for damages negligently done by him. *Dean v. McLean* (Vt.), 180.

2. **On an agreement to pay the debt of another — set-off.]** Defendant, for a valid consideration, assumed and promised to pay the debts of R., which included three promissory notes held by N. Afterward, and before maturity, N. duly transferred these notes to plaintiff. *Held*, in an action on the notes, that defendant could set off a claim held against N. *Barlow v. Myers* (N. Y.), 582.

3. **—.]** The promise of A to pay the debts of B is a promise to pay the creditors of B who are such at the time the promise is made, and any subsequent assignee of a then existing claim against B takes it subject to the equities between A and B. *Ib.*

Against railroad company for expulsion of passenger.] See RAILROAD, 125.

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AGENCY.

1. *Authority to execute instruments.*] An agent having authority may render his principal liable on an instrument not under seal, by signing his principal's name only without any indication of agency. *First National Bank v. Gay* (Mo.), 480.
 2. *Contract under seal by agent of undisclosed principal.*] An agent appointed by parol, without disclosing his agency, made in his own name a contract under seal for the purchase of real estate. *Held*, that the contract was not enforceable against the principal either as a contract under seal or as a simple one. *Briggs v. Partridge* (N. Y.), 617.
- Public charitable institution not liable for negligence of agents.*] See CHARITY, 639.

ALIEN.

Real estate of—descent—interest of State.] An alien, possessed of real estate, died intestate without any known heirs. *Held*, (1) that the real estate vested in the State, without office found; (2) that a sale of such real estate to satisfy a debt against the alien in a proceeding to which the State was not made a party, was void as to the State; but (3) that the purchaser at such sale was entitled to be substituted to the rights of the creditor, and, if the claim was just, to have the real estate subjected to its payment. *Sands v. Lynham* (Va.), 848.

On grand jury—plea in abatement to indictment.] See GRAND JURY, 285.

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Payment of, by drawee.] See NEGOTIABLE INSTRUMENTS, 612.

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Effect of death of appellant pending.] See ABATEMENT, 385.

ARREST.

1. *On civil process—privilege.*] A person brought into court upon criminal process and admitted to bail, *held* not privileged while in court from arrest on civil process. *Moore v. Green* (N. C.), 470.
 2. *Imprisonment for debt—constitutional law.*] A statute allowing an arrest in an action for libel does not violate a constitutional provision that "there shall be no imprisonment for debt except in cases of fraud." *Ib.*
 3. *Right of officer to break into dwelling-house of third person.*] An officer who has a warrant for the arrest of a person charged with a misdemeanor, and who has reasonable cause to believe that such person is in the dwelling-house of another, after notifying him that he has a warrant against a person in the house, and upon demanding entrance is refused, has a right to enter the outer door of the house by force, for the purpose of serving the warrant; and he cannot be treated as a trespasser, although he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto, and in fact the person sought for is not there. *Commonwealth v. Reynolds* (Mass.), 511.
- On bench warrant of one charged with crime discharges bail.*] See BAIL, 282.

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See CRIMINAL LAW, 83, 492.

ASSESSMENTS.

For local improvements—apportionment must be uniform—power of legislature to validate.] In levying an assessment upon lots abutting upon a street in a city, for the purpose of improving such street, a lot within the district declared to be benefited was not assessed. *Held*, (1) that the whole assessment was void, and (2) that an act of the legislature validating such assessment was unconstitutional and void. *People v. Lynch* (Cal.), 677.

For local improvements.] See MUNICIPAL CORPORATIONS, 112.

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When law loci governs.] See CONFLICT OF LAWS, 85.

ATTACHMENT.

1. *Judgment—assignment of—attachment of judgment debtor as garnishee after assignment—foreign attachment.]* A corporation of Pennsylvania recovered a judgment there against J. S., and assigned it in good faith to a resident of that State. After the assignment, but before J. S. had notice of it, he was attached in New York, where he resided, as garnishee of the corporation, by a creditor thereof, and adjudged by the New York court liable as such garnishee, notwithstanding the assignment; and he paid to the attaching creditor the amount of his indebtedness on the judgment. *Held*, (1) that the assignment, being valid in Pennsylvania, was valid everywhere; (2) that, after the assignment, the corporation had no attachable interest in the judgment; (3) that, therefore, the judgment of the court of New York, which had jurisdiction only on the ground of an attachment of the corporation property, was void; and (4) that satisfaction of it by J. S. was no bar to an action against him in Pennsylvania by the assignee of the judgment. *Noble v. Thompson Oil Co.* (Penn.), 66.

2. *Garnishee—debtor of partnership not liable in action against individual members.]* In an action against J. S. alone, a person indebted to a partnership of which J. S. is a member is not liable as garnishee. *Shedy v. Second Nat. Bank* (Mo.), 407.

3. *Garnishment of salary of public school teacher.]* The salary of a teacher employed in a public school and paid by the city is not attachable by trustee process while in the hands of the city officials whose duty it is to pay it. *Hightower v. Slaton* (Ga.), 273.

4. *Of officials' salaries.]* A municipal corporation is not liable to be garnished for the salaries of its officers, and this is true, even if the debt claimed to be due from the officer is for provisions for himself and family. *McLellan v. Young* (Ga.), 276.

In State court.] See BANKRUPTCY, 499.

Is an "incumbrance" on land.] See COVENANTS, 632.

Conditional execution of.] See SURETYSHIP, 461.

Promises to indemnify, surety on.] See STATUTE OF FRAUDS.

See BAIL, 62, 282.

BROKER.

Commissions — when earned.] The owner of real estate agreed with a broker that if the latter would "find a purchaser or make a sale of said real estate" he would give said broker a certain sum as commission. The broker procured a person to enter into a legal and binding contract with the owner to purchase said real estate, but he afterward refused to perform. *Held*, that the broker was entitled to the sum agreed. *Loos v. Miller* (Ind.), 192.

BURGLARY.

Breaking out.] See CRIMINAL LAW, 665.

BURYING GROUND.

See CEMETERY, 642.

BY-LAWS.

Of municipal corporations — violation of, how punished.] See MUNICIPAL CORPORATIONS, 240.

CARRIER.

1. *When not liable for injury to goods — usage.]* It is competent for a common carrier, in defense of an action for injury to goods, in their delivery, by the breaking of the requisite apparatus, to show a local usage that such apparatus is to be furnished by the consignee of the goods; and, if such usage is shown, the carrier is not liable for injury to the goods, occasioned by a latent defect in the apparatus furnished by the consignee. *Loveland v. Burke* (Mass.), 507.

2. *—.]* A common carrier, having a hogshead of molasses to deliver, was furnished by the owner with skids wherewith to unload it from his wagon. The skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. *Held*, that the owner could not maintain an action against the carrier for the loss. *Ib.*

Of passengers — expulsion of passenger.] See RAILROAD, 125.

CEMETERY.

Taking grounds of, for highway.] A municipal corporation cannot, without special authority given by statute, or by necessary and reasonable implication, take for a highway the lands of a cemetery; and this rule applies to the ornamental parts of a cemetery the same as to the parts used for interments. *Evergreen Cemetery Association v. The City of New Haven* (Conn.), 642.

CERTIFICATE.

Of acknowledgment, when conclusive.] See DEED, 46.

CHARACTER.

Evidence of.] See EVIDENCE, 769.

CHARITY.

- 1 *Public charitable institution—what is.*] A corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution. *McDonald v. Massachusetts General Hospital* (Mass.), 539.
2. —.] The facts that a corporation, established for the maintenance of a public hospital, by its rules requires of its patients payment for their board, according to their circumstances and the accommodation they receive; that no person has individually a right to demand admission, and that the trustees of the hospital determine who are to be received, do not render it the less a public charity. *Ib.*
3. *When not liable for acts of servant.*] A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon. *Ib.*

CHECK.

Deposit of—nature of deposit.] Checks deposited with a bank and credited in the depositor's pass-book are taken, in the absence of special agreement, for collection and not as cash; and may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another. *National Gold Bank v McDonald* (Cal.), 697.

Gift of, causa mortis.] See GIFT, 567.

CHRISTIAN NAME.

See NAME.

COMMISSIONS.

See BROKER.

COMMON CARRIER.

See CARRIER.

COMPOUNDING MISDEMEANORS.

See CONTRACTS, 534.

CONFLICT OF LAWS.

Assignments — lex loci contractus.] An assignment was made in New York, of a chose in action which, by the law of that State, vested the legal title and the right of action at law in the assignee. *Held*, that the latter might sue in his own name in Pennsylvania, although he could not have done so if the assignment had been made there. *Levy v. Levy* (Penn.), 85.

Right of State to interfere with sale of patented articles.] *See* PATENTS, 200, 220.

Actions against foreign executors and administrators.] *See* EXECUTORS AND ADMINISTRATORS, 285.

CONSIDERATION.

Act in aid of rebellion.] Plaintiff contracted to convey land to defendant in consideration that defendant would serve in the Confederate army as a substitute for plaintiff's son. Defendant served as such substitute and took possession of the land. *Held*, that the contract was void and plaintiff entitled to recover possession of the land. *Lance v. Hunter* (N. C.), 454.

See NEGOTIABLE INSTRUMENTS.

CONSTITUTIONAL LAW.

1. *Obligation of a contract — right of railroad to regulate rates.*] The charter of a railroad conferred upon the company the power to regulate its tolls for a certain length of time. During that time the legislature passed an act to regulate the same tolls. *Held* unconstitutional. *Sloan v. Pacific R. R. Co.* (Mo.), 897.

2. *Statute impairing obligation of contract.*] A railroad company in which the State had a controlling interest, and which had a right under its charter to change the gauge of its road track at will, leased such road. *Held*, that a statute thereafter passed forbidding the lessees to change such gauge was unconstitutional as impairing the obligation of a contract. *State v. Richmond, etc., R. R. Co.* (N. C.), 478.

3. *Delegation of legislative power to popular vote.*] An act provided that it should not be lawful for cattle to run at large in any county which, by a majority vote, should agree to restrain them. *Held* unconstitutional, as a delegation of legislative power. *Lammert v. Lidwell* (Mo.), 411.

4. *Right of suffrage — registration.*] The constitution of North Carolina provides that "every male person twenty-one years old, resident in the State twelve months and in the county thirty days, shall be an elector." *Held*, that a statutory provision requiring ninety days' residence as a qualification for voting for city officers was unconstitutional. *Held*, also, that under a constitutional authority to provide for registration, the legislature could not enact a registry law practically disfranchising electors. *People v. Canaday* (N. C.), 465.

5. *Apportionment of representation.*] A statute gave to each ward of a city an equal number of aldermen in the municipal council, but so divided the city that two wards contained 400 voters each, while the remaining ward had 2,800 voters. *Held*, in violation of the principle, that representation should be apportioned as near as may be to the popular vote, and void. *Id.*

6. *Vacancy in office of governor — absence from the State.*] The constitution of Louisiana provides that in case of "absence from the State" of the governor, the power and duties of his office shall devolve upon the lieutenant-governor. *Held* not to refer to a mere temporary absence, and the fact that the governor was at a place out of the State, but within a few hours' ride of the capital, for a period of twenty-one days, did not authorize the lieutenant-governor to exercise the functions of governor. *State v. Graham* (La.), 551.
7. *Religious discrimination.*] A municipal ordinance forbade the sale of goods on Sunday, but excepted from its operation those keeping their business places closed on Saturday. *Held* unconstitutional, as giving to Jews a privilege denied to others. *City of Shreveport v. Levy* (La.), 553.
8. *Act forbidding private markets.*] An act of the legislature provided that there should not be any private market kept within twelve squares of a public market in the city of New Orleans. *Held* not unconstitutional, either as taking away the property of those keeping private markets at the time of the passage of the act within the prescribed limits, or as taking away the vested rights of those holding licenses to keep such markets. *City of New Orleans v. Stafford* (La.), 563.
9. *Municipal taxation for private purposes.*] A statute authorized a municipal corporation, with the consent of a majority of the owners of taxable property, to subscribe for the stock of a private corporation and to issue bonds in payment therefor. *Held*, (1) that the statute was void inasmuch as it attempted to authorize taxation for other than public purposes; (2) that the fact that the corporation would tend to increase the business prosperity of the town did not render its purpose public; and (3) that the town was not estopped from denying the validity of the bonds by the fact that it had previously voted a special tax to pay interest thereon. *Weisner v. Village of Douglas* (N. Y.), 586.
10. *Taxation of liquor dealers — police power.*] A statute provided that all liquor dealers should take out a special license in addition to all other licenses required by law, and should pay therefor ten dollars, and that the moneys so received should constitute a fund for the foundation and maintenance of an asylum for inebriates. *Held*, that the act was within the police power of the legislature and not in violation of the constitutional provision against unequal taxation. *State v. Cassidy* (Minn.), 765.
- Arrest in actions for libel.*] *See* ARREST, 470.
- Enacting clause of statute.*] *See* STATUTE, 738.
- Statute authorizing common council of city to punish for contempt, void.*] *See* CONTEMPT, 503.
- Validity of statutes limiting or regulating sale of patented articles.*] *See* PATENTS, 200, 220.
- Validating irregular assessments.*] *See* ASSESSMENTS, 677.

CONTEMPT.

1. *Punishment for, by municipal board.*] The common council of a city has no power to commit and punish for contempt; and a statute which under

takes to confer such authority is unconstitutional and void. *Whitcomb's Case* (Mass.), 502, and *note*, 507.

2. *Proceedings to punish for — sentence — presence of offender.*] Proceeding to punish for contempt of court is not a criminal proceeding within a statute denying criminal jurisdiction to a court. *Middlebrook v. State* (Conn.), 650.
3. —.] A sentence for contempt committed in the presence of the court is valid though pronounced in the absence of the offender. *Ib.*

CONTRACT.

1. *For compounding misdemeanor.*] An action will not lie on an agreement entered into for the purpose of compounding any misdemeanor, unless it appears that satisfaction has been acknowledged in and approved by the court in which the prosecution was pending, according to the Gen. Stats., ch. 170, § 83, and ch. 171, § 28. *Partridge v. Hood* (Mass.), 524.
2. *Illegal agreements — instruments in furtherance void.*] All instruments made for the purpose of giving effect to an illegal agreement are tainted with the illegality and cannot be enforced in a court of equity. *Blasdel v. Fowle* (Mass.), 538.
3. *Against public morals.*] Plaintiff sold furniture to defendant with knowledge that it was to be used in fitting up a house of ill fame. *Held*, in an action for the purchase-price, that the defense that the contract was one against public morals was not available. *Mahood v. Tealsa* (La.), 546.

By agent.] See AGENCY, 617.

In restraint of trade.] See RESTRAINT OF TRADE, 9.

In aid of rebellion.] See CONSIDERATION, 454.

Of persons non compos, when valid.] See INSANITY, 24, and *note*, 29.

Secret agreement to pay some debts in full.] See BANKRUPTCY, 533.

CONTRIBUTIONS.

Among insurance companies holding risks on same property.] See INSURANCE, 1

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCE.

See DEED.

CONVICTION

Of lesser degree.] See CRIMINAL LAW, 83.

On new trial — for what degree of crime.] See CRIMINAL LAW, 154.

Former conviction, plea of.] See CRIMINAL LAW.

CORPORATION.

Recovery for services performed before incorporation.] In an action against a railroad company to recover the value of services performed before the

incorporation, in procuring the charter, making surveys, etc., *held*, that plaintiff could not recover, in the absence of proof that a majority of the incorporators or promoters of the corporation authorized the service. *Bell's Gap R. R. Co. v. Christy* (Penn.), 89.

Removal by, of suits to Federal courts.] See REMOVAL OF SUITS, 757.

COSTS.

Pardon does not relieve from.] See PARDON, 487.

COUNTY TREASURER.

Liability of.] Action on behalf of a county against a county treasurer to recover moneys received by him as interest on public moneys deposited by him in a bank. Held, that the county treasurer was not a bailee of the public moneys, but a debtor therefor, and that, therefore, he was not liable for such interest. *Shelton v. State* (Ind.), 197.

COVENANT.

1. *Incumbrances — highway is not.] A covenant against incumbrances in a deed of land is not broken by the existence of a public road over the land known to the purchasers at the time of the purchase. Desvergers v. Wilks* (Ga.), 289.
2. *Against incumbrance — attachment.] An attachment of land is an incumbrance within the meaning of a covenant against incumbrances in a deed. Kelsey v. Remer* (Conn.), 688.
3. *Damages.] The grantee of lands paid in good faith the amount of a judgment recovered in an attachment suit against his grantor in order to free the lands from the incumbrance of the attachment. Held*, in an action against the grantor on the covenants in the deed, that plaintiff was entitled to recover the amount so paid if not greater than the value of the land; and that the fact that the levy of the execution in the attachment suit was irregular was no defense. *Ib.*

CREDITOR.

See DEBTOR AND CREDITOR.

CRIMINAL LAW.

1. *Trial — sentence — neglect to ask why sentence should not be pronounced.] The record of a capital conviction failed to show that, before sentence, the prisoner was asked if he had anything to say why sentence should not be pronounced. Held*, that the sentence should be reversed and the prisoner remanded for resentencing. *McCue v. Commonwealth* (Penn.), 7, and note, 8.
2. *Proceedings at sentence.] Asking a person convicted of a crime not capital, before sentence, if he has anything to say why sentence should not be pronounced against him, is not necessary though usual. State v. Taylor* (La.), 561.
3. *Indictment for felony — conviction of lesser crime.] Defendant was indicted for an assault with intent to kill. Held*, that he could be convicted of a simple assault. *Hunter v. Commonwealth* (Penn.), 88.

4. *New trial — twice in jeopardy.*] A person, indicted for murder in the first degree, was convicted of murder in the second degree, and obtained a new trial. *Held*, (1) that on the second trial he could not be tried for or convicted of a higher crime than murder in the second degree, and (2) that a statute providing that "the granting of a new trial places the parties in the same position as if no trial had been had," could not constitutionally be construed to authorize a conviction of murder in the first degree on the second trial. *Johnson v. State* (Ark.), 154.
5. *Plea of former conviction — conviction in inferior court.*] Defendant was indicted and held to bail in a superior court on the charge of keeping open a tippling house on Sunday, April 4, 1878. Pending the indictment he was prosecuted and convicted in an inferior court for the same offense, charged to have been committed June 8, 1878. On the trial of the indictment he pleaded such conviction, and alleged that the indictment and the conviction were for one and the same offense. *Held*, that the plea was good. *Maher v. State* (Ga.), 269.
6. *Mistrial — discharge of jury in absence of prisoner — autrefois convict.*] Upon the trial of an indictment for murder, a verdict of guilty was received and the jury discharged, in the absence of the prisoner, who was confined in jail. The verdict was for such irregularity set aside on defendant's motion, and the defendant was again arraigned for trial upon the same indictment. *Held*, that he had been once in jeopardy and could not be tried again for the same offense. *Nolan v. State* (Ga.), 281.
7. *Verdict — failure to specify degree of crime — twice in jeopardy — new trial.*] Upon the trial of an indictment for murder the jury returned a verdict of guilty, without specifying the degree. The statute divided murder into two degrees, and provided that the jury should specify the degree. *Held*, (1) that the verdict was bad and that no judgment could be rendered on it; (2) that it being within the power of the defendant to have had the verdict corrected, when rendered, he is considered as consenting to it and as waiving objection to being tried before another jury. *State v. Rever* (Nev.), 745.
8. *Indictment — robbery of bank bills.*] An indictment for robbery of bank bills alleged the value of the bills but not their denomination. *Held* bad. *Arnold v. State* (Ind.), 175.
9. *Burning prison by prisoner — intent.*] A prisoner burned a hole in the guard-house wherein he was confined for the purpose of escaping, and with no intent to consume or to generally injure the building. *Held*, not guilty of an attempt to burn a house. *Jenkins v. State* (Ga.), 255, and note, 257.
10. *Intent — mistake of fact.*] The keeper of a billiard table was indicted for permitting an infant to play billiards thereon without the consent of his parent or guardian. *Held*, that if defendant honestly believed from the appearance of the infant and from his answers to questions that he was of full age, there could be no conviction. *Stern v. State* (Ga.), 268, and note, 268.

11. *Larceny by finder of lost property.*] One who finds lost property and converts it to his own use, without attempting to restore it to the owner, is not guilty of larceny if he does not know or have means of ascertaining who the owner is. *Bailey v. State* (Ind.), 182, and *note*, 187.
 12. *Perjury — evidence — defendant's statements.*] Upon the trial of an indictment S. testified to certain facts. Afterward he stated that he had sworn falsely, and, upon re-examination, testified to directly contradictory facts. Upon an indictment for perjury, *held*, that his own statements were not sufficient to convict him of perjury. *Schwartz v. Commonwealth* (Va.), 865.
 13. *When bail will be taken after mistrial.*] Defendant was indicted for murder in the first degree; was twice tried, and on both trials the jury was unable to agree; subsequently the jail wherein he was confined was broken open and other prisoners escaped, but he refused to go. *Held* a proper case for allowing the privilege of bail. *Petition of Alexander* (Mo.), 898.
 14. *Malicious mischief.*] It is not an indictable offense at common law to wound cattle maliciously. *State v. Manuel* (N. C.), 455.
 15. *Larceny — principal and accessory.*] In petit larceny there are no accessories, but all are principals. Accordingly, where there is no distinction between grand and petit larceny, and all felonious stealing is punished as petit larceny, one aiding, abetting or advising a larceny is indictable as principal. *State v. Gaston* (N. C.), 459.
 16. *Assault with intent to commit rape — evidence.*] A negro, seeing a white woman passing alone through a piece of woods, gave chase to her, crying out to her several times to stop. She ran, and he did not overtake her until she was out of the woods and in sight of a dwelling-house, when he ran back into the woods. *Held*, sufficient to sustain a conviction for assault with intent to commit rape. *State v. Neely* (N. C.), 496.
 17. *Burglary — breaking out.*] A person in the night season entered a dwelling-house without breaking, for the purpose of committing a felony, but broke out in making his escape. *Held*, to be burglary at common law. *State v. Ward* (Conn.), 665 and *note*, 669.
 18. *Rape — assault with intent to commit.*] Upon the trial of an indictment for rape committed upon a female within the age of twelve years, the defendant was convicted of an assault with intent to commit rape. *Held*, error, if what defendant did was with the female's actual consent. *State v. Pickett* (Nev.), 754.
 19. *Assent of female under twelve years.*] An attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she is within the age of twelve years or not. *Ib.*
- Arrest on warrant — right of officer to break into dwelling of third person.*] See ARREST, 511.
- Bigamy — proof of marriage.*] See BIGAMY, 225.
- Evidence of character and disposition.*] See EVIDENCE, 769.
- Insanity as a defense.*] See INSANITY, 669.
- Perjury before United States commissioner.*] See JURISDICTION, 273.
- See EMBEZZLEMENT, 764.

CROPS.

Mortgage of, before planting.] See MORTGAGE, 718.

DAMAGES.

1. *For diversion of water — evidence.]* Action to recover damages for diverting a water-course from plaintiff's tannery by means of a pipe placed by defendant on his own land. *Held*, that plaintiff could recover only for his damage actually suffered before action brought, and not for a permanent injury to his freehold, and, therefore, that evidence of the value of the tannery was not competent. *Bare v. Hoffman* (Penn.), 42.
 2. *Contract by husband to sell land — refusal of wife to join in deed.]* A husband contracted to sell land. The wife, without collusion with the husband, refused to join in the deed. In an action for a breach of the contract, *held*, that compensatory damages only were recoverable. *Burk v. Serrill* (Penn.), 105.
 3. *Streets — damages for lands taken for — benefits.]* Upon a trial to assess damages for land taken to widen a street it is erroneous to instruct the jury that no benefit which was shared in common with other estates on the highway, from which no land had been taken, can be deducted from the damages of any abutter. *Hilbourn v. County of Suffolk* (Mass.), 522.
- Measure of, for deficiency in lands sold.]* See VENDOR AND PURCHASER, 817, 820.
- Exemplary, against railroad company for acts of servants.]* See RAILROAD, 871.
- In action for breach of covenant against incumbrancer.]* See COVENANTS, 638.
- In action of master against servant for servant's negligence.]* See MASTER AND SERVANT, 647.

DEBTOR AND CREDITOR.

1. *Collateral security — loss of, through neglect of creditor.]* Where a creditor holds a collateral security for the protection of his debt, and the collateral is lost by the insolvency of the debtor in the collateral instrument, through the negligence of the creditor, the latter is liable for the loss to his own debtor. *Hanna v. Holton* (Penn.), 20.
2. *Statute of limitations.]* Plaintiff assigned to defendant, as collateral for money lent, a judgment, the lien of which expired September, 1878. The defendant neglected to revive his lien, and the judgment debtor sold his land in 1886, and the judgment was lost. *Held*, (1) that the defendant was liable to plaintiff for the judgment, and (2) that (the judgment debtor being solvent when his land was sold) the statute of limitation began to run from the time of the sale, and not from the expiration of the lien. *Id.*

See SURETY.

DEED.

1. *Acknowledgment — certificate conclusive.]* The certificate of a magistrate of the acknowledgment of a deed or mortgage is a judicial act and conclusive in the absence of fraud or duress as to the facts therein stated. *Hester v. Glasgow* (Penn.), 46.

2. *Question for jury.*] The certificate of the acknowledgment by a wife of a mortgage of her own property was in due form; at the time of the acknowledgment she told the justice she had read the mortgage but he did not make known its contents to her. This appeared by the testimony of the wife and of the justice. The court below decided that this was conclusive against the validity of the mortgage. *Held*, to be error; the whole was for the jury. *Ib.*
 3. *Delivery of — registry before delivery.*] A deed was duly signed, sealed and recorded, but was not delivered to the grantee nor accepted by him until long after. *Held*, that although as between the grantor and grantee it might take effect from the date when it was left for record, yet as against attaching creditors it took effect only from the time of delivery and acceptance by the grantee. *Bell v. Farmers' Bank* (Ky.), 205.
 4. *Delivery in escrow — conditional delivery — evidence.*] When a deed, perfect upon its face, is delivered to the grantee or obligee as an escrow, upon a condition that it shall be a valid deed upon its execution by another person, it is valid and operative though the condition is not complied with, and parol evidence of the condition is not admissible. *Miller v. Fletcher* (Va.), 856.
 5. *Covenants in, against incumbrance — when highway is no breach of.*] A covenant against incumbrance in a deed of land is not broken by the existence of a public road over the land known to the purchaser at the time of the purchase. *Dessebergers v. Willis* (Ga.), 289.
 6. *General warranty.*] A vendor of real estate in his own right is bound to convey the same with general warranty unless it be otherwise agreed between the parties. *Hoback v. Kilgore* (Va.), 817.
- Covenant against incumbrance — breach of.*] See COVENANT, 688.
- Deficiency in land sold — measure of damage.*] See VENDOR AND PURCHASER, 817, 820.
- From husband to wife — when equity will sustain as against creditors.*] See HUSBAND AND WIFE, 808.
- Refusal of married woman to join in.*] See DAMAGES, 105.
- Registry of — right of citizens to inspect.*] See REGISTRY OF DEEDS, 226.

DELIVERY.

Of deed — registry before.] See DEED, 205.

DESCENT.

Of real estate of aliens.] See ALIEN, 348.

DURESS.

Compelling one charged with crime to insert foot in track.] See EVIDENCE, 422.

DYING DECLARATIONS.

See EVIDENCE, 330.

BASEMENT.

Right of way — adverse user.] See WAY, 579.

Of light and air.] See LANDLORD AND TENANT, 639.

ELECTION.

Qualifications for voting — registry law.] See CONSTITUTIONAL LAW, 465.

EMBEZZLEMENT.

Title to property — interest of defendant.] Under a statute making it larceny to embezzle "any money or property of another," held, that the money or property embezzled must be entirely the money or property of another, and that, therefore, if the accused have an interest in any part of it, he cannot be convicted of embezzlement under the statute. State v. Kent (Minn.), 764.

EQUITY.

Lien in, under mortgage on property not in esse.] See MORTGAGE, 170.

Jurisdiction of suit to establish lost will — probate of will.] See WILL, 242.

ESCHEAT.

See ALIEN, 848.

ESCROW.

Delivery of deed in.] See DEED, 856.

ESTOPPEL.

Of mortgages by declarations made in his presence.] Land on which was a mortgage duly recorded, was sold at auction in the presence of the mortgagee. The auctioneer announced that the land was unincumbered, and the mortgagee failing to correct the announcement, the purchaser bought it under the impression that he was getting a clear title. Held, that the mortgagee was estopped from afterward setting up his mortgage as against the purchaser. Markham v. O'Connor (Ga.), 249.

Of municipal corporation from denying validity of bonds.] See MUNICIPAL CORPORATION, 586.

See HOMESTEAD, 457; JOINT TORT-FEASORS, 214; JUDGMENT, 417.

EVIDENCE.

1. *Proof beyond reasonable doubt not required in civil cases.] In an action on a policy of insurance against fire, defendant pleaded that the property was fraudulently burned by plaintiff. Held, that defendant was not bound to prove such defense beyond a reasonable doubt. Allna Ins. Co. v. Johnson (Ky.), 228.*

2. *Res gestæ — dying declarations.] J. was wounded in a fight with defendant, and on the same day, while expecting to die, made certain statements in relation to the fight. He lived ten days longer, and his physicians expressed hope to him that he would recover, and he said: "I hope so, too," but at last died of the wounds. Held, that evidence of his statements*

was admissible in the trial of defendant for murder. *Steisher v. Commonwealth* (Va.), 880.

2. *Duress — foot-prints — compelling prisoner to furnish evidence.*] An officer, who had arrested a prisoner charged with larceny, compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison. *Held*, that the evidence was not procured by duress and was admissible. *State v. Graham* (N. C.), 493.

4. *Of character in criminal cases — negative evidence.*] Negative evidence of character is competent; for instance, the testimony of a witness who swears that he has been acquainted with an accused person for a considerable time, under such circumstances that he would be more or less likely to have heard what was said about him, and has never heard any remark about his character—the fact that a person's character is not talked about at all being excellent evidence that he gives no occasion for censure, or, in other words, that his character is good. *State v. Lee* (Minn.), 769.

5. *Disposition.*] The disposition of a person may be proved as a fact by a witness who knows what the disposition in question is from his own personal observation. *Ib.*

In action for diversion of water-courses.] *See* DAMAGES, 43.

In actions of slander.] *See* SLANDER, 116.

Of perjury — defendant's statements.] *See* CRIMINAL LAW, 865.

Of assault with intent to commit rape.] *See* CRIMINAL LAW, 496.

Parol, of conditional delivery of deed.] *See* DEED, 856.

Parol, to contradict note as to time of payment.] *See* NEGOTIABLE INSTRUMENTS, 402..

To impeach statute.] *See* STATUTE, 721.

To impeach acknowledgment of deed.] *See* DEED, 46.

EXECUTORS AND ADMINISTRATORS.

Power of one of several executors.] Co-executors deposited money belonging to the estate with bankers to their joint account as executors; the bankers failed and assigned their property for the benefit of creditors. *Held*, that one of the executors could not release the claim of the estate against the bankers by signing with other creditors an agreement to look solely to the funds in the hands of the assignee. *De Haven v. Williams* (Penn.), 107.

2. *Jurisdiction of actions against.*] An administrator appointed in Alabama and the sureties on his bond there given became residents of Georgia. *Held*, that they were liable to an action in Georgia by the distributees for a breach of the bond. *Johnson v. Jackson* (Ga.), 285.

3. —.] *Seemle*, if foreign executors or administrators come within the jurisdictional limits of a State, they are liable to be sued there by creditors, or to be brought to an account by legatees or distributees. *Ib.*

EXECUTION.

Failure of sheriff to enforce — assignment to sheriff.] *See* JUDGMENT, 422.

FIDUCIARY DEBTS.

See BANKRUPTCY, 554.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

1. *Machinery in a factory.*] A building was erected and used for a factory and filled with machinery necessary for that purpose. *Held*, that the machinery was to be regarded as realty and pass with the building, though it might be removed without injury either to it or the building. *Green v. Phillips* (Va.), 323.

2. *Gas fixtures.*] Gas fixtures are movables and neither are covered by a mechanic's lien, nor do they pass on sale of a house. *Jerebi v. Philharmonic Society* (Penn.), 78, and note, 80.

Foreign attachment.] *See* ATTACHMENT, 66

FOREIGN CORPORATION.

Appointment of agents by—failure to comply with statute.] *See* INSURANCE, 80.

See REMOVAL OF SUITS, 757.

FORMER CONVICTION.

See CRIMINAL LAW, 154, 269, 745.

FRAUD.

Action for price of goods sold to defraud creditors.] In an action for the price of goods sold and delivered, the defense was interposed that the sale was for the purpose of defrauding plaintiff's creditors. *Held*, that the defense being made out, the plaintiff could not recover. *Heineman v. Newman* (Ga.), 279.

Statute of.] *See* STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

Deed from husband to wife.] *See* HUSBAND AND WIFE, 303.

FRAUD AND MISTAKE.

Estoppel by silence.] *See* ESTOPPEL, 249.

GARNISHMENT.

See ATTACHMENT, 66, 273, 276, 407.

GAS FIXTURES.

Do not pass in sale of house.] *See* FIXTURES, 78, and note, 80.

GIFT.

Gift causa mortis—of check on bank.] On the day before he died the plaintiff's testator delivered to defendant, with the intention of giving it to

her, a bank check drawn by another to testator's order and indorsed in blank by him. The check was not presented for payment until after testator's death. *Held*, a valid gift. *Burke v. Bishop* (La.), 567.

GOVERNOR.

Absence from the State — vacancy in office of.] See CONSTITUTIONAL LAW, 551.

GUARDIAN AND WARD.

Seduction of ward — action by guardian.] See SEDUCTION, 536.

GRAND JURY.

Alien on — plea in abatement to indictment.] Plea in abatement to an indictment that one of the grand jurors who found it was an alien. *Held*, good. *Reich v. State* (Ga.), 265.

GRANT.

See DEED.

HIGHWAY.

When not an incumbrance within the covenant of a deed.] See DEED, 299.

Damages for lands taken for.] See DAMAGE, 522.

Grounds of cemetery cannot be taken for.] See CEMETERY, 648.

HOMESTEAD.

Estoppel — landlord and tenant.] Under an execution against defendant lands in which he had a right of homestead were sold. Subsequently he took a lease of such lands from the purchaser, and after the expiration of the term thereof continued in possession. *Held*, that he was not estopped from claiming homestead in the lands, but could not set up that defense to an action by his landlord to recover possession thereof. *Abbott v. Cromartie* (N. C.), 457.

HUSBAND AND WIFE.

1. *Contract by husband to sell land — refusal of wife to join in deed — damages.*]

A husband contracted to sell land; the wife, without collusion with the husband, refused to join in the deed. In an action for a breach of the contract, *held*, that compensatory damages only were recoverable. *Burk v. Serrill* (Penn.), 105.

2. *Conveyance by husband to wife — when equity will sustain, as against subsequent*

creditors.] A husband conveyed all his real estate directly to his wife in consideration of "love and affection," and the deed was duly recorded. He was at the time but slightly in debt and was possessed of a large amount of personal property. He afterward contracted debts which his personal property — by reason of losses occasioned by war — was insufficient to pay, and his creditors (one of whom had a small claim which was due when the conveyance was made) filed a bill in equity to subject the land conveyed to the wife to the payment of the debts. *Held*, the deed was good in equity, and that the land would not be subjected to the debts. *Sayers v. Wall* (Va.), 808.

ILLEGAL CONTRACT.

See CONTRACTS.

IMPRISONMENT.

For debt — in action for libel.] See ARREST, 470.

INCREASE OF RISK.

See INSURANCE, 702.

INDICTMENT.

Plea in abatement — aliens in grand jury.] It is a good plea in abatement to an indictment that one of the grand jurors who found it was an alien. Reich v. State (Ga.), 265.

Description of property.] See CRIMINAL LAW, 175.

INDORSEMENT.

Without recourse.] See NEGOTIABLE INSTRUMENTS, 152.

INJUNCTION.

To enforce contract, in restraint of trade.] See RESTRAINT OF TRADE, 9.
Of collection of tax.] See TAX, 292.

INQUEST.

In case of lunatics.] See INSANITY, 24, and *note*, 29.

INQUEST OF OFFICE

See ALIEN.

INSANITY.

1. *When a defense to contracts — when inquest no defense to prior transaction.] Defendant, desiring to borrow money, gave S. his note, which S. procured to be discounted at plaintiff's bank, and the money deposited to defendant's order. Afterward a petition *de lunatico inquirendo* was presented against defendant, and he was found to be a lunatic, and to have been a lunatic from a time anterior to the making of the note. The plaintiff had no notice of defendant's lunacy. Held, that defendant's insanity was not a defense to an action on the note. Lancaster County Bank v. Moore (Penn.), 24, and *note*, 29.*
2. *When partial insanity will reduce the degree of crime.] A person was indicted for murder in the first degree and convicted, notwithstanding there was some evidence tending to prove his insanity. Upon a petition for a new trial on the ground of newly-discovered evidence, tending further to establish insanity, held, that a new trial should be granted, and that, even if the proof should not establish a total want of responsibility by reason of insanity, yet, if it showed that the prisoner's mind was so far impaired as to render him incapable of a deliberate, premeditated murder, he should be convicted only of murder in the second degree. Anderson v. State (Conn.), 669.*

8. *Moral mania.*] The jury ought to consider moral mania, if satisfied of its existence, in determining the degree of crime, and give it such weight as it is fairly entitled to under the circumstances. *Ib.*

See INSURANCE, 549.

INSOLVENT LAWS.

Not wholly superseded by bankrupt law — when compulsory proceedings under State laws will be sustained.] State insolvent laws are not wholly superseded by the Bankrupt Act; therefore compulsory proceedings under a State law to distribute the assets of an insolvent debtor were *held* valid, it appearing that the debtor declined to go into voluntary bankruptcy; that he had committed no act of bankruptcy of which the creditors could avail themselves, and that the proceedings could not obstruct his becoming a voluntary bankrupt and obtaining a discharge as such. *Geery's Appeal* (Conn.), 658.

INSURANCE.

1. *Appointment of agents by foreign company — failure to comply with statute defense to action on agent's bond.*] In an action on a bond given by the agent of an insurance company incorporated in another State, to recover moneys collected as premiums, *held*, that it was a good defense that the plaintiff had not complied with the statutes of the State in appointing said agent, and that said agent had not qualified himself to act as such statutes required. *Thorne v. Travelers' Ins. Co.* (Penn.), 89.

FIRE.

2. *Contribution by several companies.*] Three companies insured goods in every part of a building. One of them made a further insurance of goods in the upper stories only. A loss occurred which, in the lower stories, exceeded the amount of the first insurance, and in the upper stories exceeded the amount of the second insurance. *Held*, that the second insurance was payable in full, and that the first policies did not contribute to it. *Royal Ins. Co. v. Roedel* (Penn.), 1.
3. *Condition in policy as to arbitration to ascertain loss.*] A policy of insurance against fire was conditioned that in case of difference between the assured and the company, touching the amount of any loss, such difference should be submitted to arbitrators, whose decision should "be final and conclusive;" and no action was to "be maintained on the policy, unless the amount of loss or damage in case of difference or dispute shall be first ascertained." *Held*, (1) that the condition did not oust the court of jurisdiction of an action on the policy, and (2) that, if the condition was of any effect, the company must show that they admitted the validity of the policy and their liability under it, and that the only question was as to the extent of the loss. *Menta v. Armenia Fire Ins. Co.* (Penn.), 80.
4. *Condition forbidding transfer.*] A fire insurance policy issued to a firm contained a clause rendering it void in case of its assignment or transfer without the consent of the insurer. *Held*, that this did not apply to a transfer from one partner to another of his interest in the insured property, and such transfer would not avoid the policy. *Dermani v. Home Mut. Ins. Co.* (La.), 544.

5. *Construction of policy — "fallen" building — increased risk.*] A building was insured by a policy, conditioned to be void if the building should fall, except by fire. The wall of part of the building fell, leaving more than three-fourths standing. *Held*, that the policy was not avoided. A policy of fire insurance was conditioned to be void "in case of any change by which the degree of risk is increased, without the written consent of the company." *Held*, to have reference only to change produced by the act of the insured and not to change occasioned by accident. *Breuner v. Liverpool and London and Globe Ins. Co.* (Cal.), 708.

6. *Defense of willful burning — degree of proof.*] Where the defense of willful burning is interposed to an action on a policy against fire, it need not be proved "beyond a reasonable doubt." *Atlas Ins. Co. v. Johnson* (Ky.), 238.

LIFE.

7. *Death caused by unlawful surgical operation.*] No recovery can be had upon a policy of life insurance, on the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. *Hatch v. Mutual Life Ins. Co.* (Mass.), 541, and note, 542.

8. *Conditions avoiding policy — suicide by insane person.*] A life insurance policy contained a clause avoiding it if the insured "should die by his own hands." *Held*, that suicide by the insured while insane would not avoid the policy. *Phillips v. Louisiana Equitable Life Ins. Co.* (La.), 549.

INTENT.

See CRIMINAL LAW, 255, 268.

INTEREST.

When payable.] *See NEGOTIABLE INSTRUMENTS, 402.*

See USURY.

JEOPARDY

What is.] *See CRIMINAL LAW, 154, 269, 281.*

JOINT TORT-FEASORS.

Judgment against one when not a bar to action against others — measure of recovery — estoppel.] Plaintiff recovered judgment in an action of tort against one who was jointly liable with defendant, which judgment was satisfied in part; and afterward brought this action for the same cause. *Held*, (1) that to constitute the first judgment a bar to this action it must have been fully satisfied, and (2) that defendant having pleaded the first judgment in bar, both parties were concluded by it as to the measure of recovery in this action. *United Society of Shakers v. Underwood* (Ky.), 214.

JUDGE.

Appointments by de facto judge.] *See OFFICER, 479.*

JUDGMENT.

1. *When re-insurer bound by judgment against insurer — priority.*] An action upon a policy of insurance was defended by the insurers by the advice and for the benefit of the re-insurers; but the plaintiff recovered judgment for damages and costs. In a subsequent action on the policy against the re-insurers — *Held*, that they were bound by such judgment though not parties to the action. *Strong v. Phœnix Ins. Co.* (Mo.), 417.

2. *Assignment to sheriff — right of sheriff to enforce.*] A sheriff neglected to enforce an execution until after it was spent, and then paid the amount due thereon, and took an assignment for his own benefit to a third person. *Held*, not to extinguish the judgment, and that an alias execution might issue. *Helig v. Lemly* (N. C.), 489.

Assignment of — attachment of judgment debtor as garnishes after assignment.] See ATTACHMENT, 66.

Against one joint tort-feasor — when bars action against others.] See JOINT TORT-FEASORS, 314.

JURISDICTION.

Of offenses against laws of United States.] A State court has no jurisdiction of the offense of perjury committed before a United States commissioner during the investigation of a charge of violating the laws of the United States. *Ross v. State* (Ga.), 278.

Of action as to lost will.] See WILL, 242.

Of actions against foreign administrators.] See EXECUTORS AND ADMINISTRATORS, 285.

Of attachment suit in State court.] See BANKRUPTCY, 499.

To punish for contempt.] See CONTEMPT, 502.

JURY.

Duty of, in action by servant against master for injuries.] See MASTER AND SERVANT, 2.

LANDLORD AND TENANT.

Lease — easement of light and air.] Plaintiffs leased a store with the appurtenances in a building occupied by several tenants. A yard adjoined the building which contained privies for the use of the tenants and furnished light necessary for the back part of plaintiffs' store. A door led from plaintiffs' store to the yard and a door from a hallway used by all the tenants. Plaintiffs having a privy elsewhere, with the consent of the landlord and for their own convenience, closed up the door leading from their store. Subsequently defendant took a lease of the whole premises subject to plaintiffs' lease, and began to excavate in the yard for the purpose of building thereon. *Held*, that plaintiffs had an easement in the yard for light and air and this right was not affected by the door leading thereto from their store. *Doyle v. Lord* (N. Y.), 629.

When landlord is liable for nuisance on leased premises.] See NUISANCE, 189.

Tenant cannot deny landlord's title.] See HOMESTEAD, 457.

LARCENY.

By finder of lost property.] One who finds lost property and converts it to his own use without attempting to restore it to the owner is not guilty of larceny, if he does not know or have means of ascertaining who the owner is. *Bailey v. State* (Ind.) 182, and note, 187.

No accessories in petit larceny.] See CRIMINAL LAW, 459.

See EMBEZZLEMENT.

LEASE.

See LANDLORD AND TENANT.

LEX LOCI CONTRACTUS.

In case of assignment.] See CONFLICT OF LAWS, 85.

LIBEL.

Arrest in action for.] See ARREST, 470.

LICENSE.

See CONSTITUTIONAL LAW, 765.

LIEN.

Under a mortgage on property not in case.] See MORTGAGE, 179.

See MECHANIC'S LIEN.

LIMITATION OF ACTIONS.

1. *When statute runs on note.]* Action brought December 24, 1874, on a promissory note dated December 24, 1867, payable one year from date and not entitled to grace. It did not appear that there were a demand and refusal of payment on the day the note fell due. *Held*, that the statute of limitation of six years had not run, and that the action was well brought. *Bee-man v. Cook* (Vt.), 128.

2. *Computation of time.]* In computing the time of the limitation of an action on a promissory note, the day on which it matures is to be excluded; and the rule is the same where the note is payable at a bank, so that an action might be brought upon it after business hours on the day of maturity. *Blackman v. Nearing* (Conn.), 634.

When does not apply to set-off.] See NATIONAL BANK, 17.

See DEBTOR AND CREDITOR, 20

LORD'S DAY.

See SUNDAY.

LUNACY.

See INSANITY.

MALICIOUS MISCHIEF.

Wounding cattle not indictable at common law.] See CRIMINAL LAW, 455.

MARRIAGE.

Proof of, in a prosecution for bigamy.] See BIGAMY, 225.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Liability of master for injury to servant — who are fellow-servants.] Where a master places the entire charge of his business or a distinct branch of it in the hands of an agent, exercising no discretion and no oversight, the negligence of the agent in supplying and maintaining suitable instrumentalities is a breach of duty for which the master is liable. Whether the master has thus surrendered to an agent the charge of his business is a question for the jury. *Mullan v. Philadelphia, etc., Steamship Co. (Penn.)*, 2, and *note*, 7.*
2. *Province of the jury.] In an action by a servant against his master to recover for injuries alleged to have been negligently caused by an agent of the master, it is for the jury to determine the cause of the injury, the relation of the alleged agent to the parties, and whether the injury was occasioned by a risk assumed by plaintiff as an incident of his employment. *Ib.**
3. *Negligence of co-servant — liability of master.] Plaintiff's intestate was killed while in defendant's service by the fall of a mash-tub. The evidence showed that defendant superintended his business; that he employed a competent carpenter who had charge of the repairs; that the fall of the tub was occasioned by the decay of the timbers on which it rested owing to constant dampness; that this decay was not apparent, but could have been easily detected by proper tests. *Held*, that defendant was not liable for plaintiff's death. *Malone v. Hathaway (N. Y.)*, 578, and *note*, 579.*
4. *—.] Per ALLEN, J. When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the alter ego of the master to whom he has left every thing, then the middleman's negligence is the negligence of the employer for which the latter is liable. But when the master is an individual acting sui juris, and there is no evidence of a surrender of power and control to any subordinate, and he is present superintending the establishment in person, no such responsibility attaches in respect of the acts of a competent foreman selected by and in the employment of the master. *Ib.**
5. *Duty of master in providing proper machinery.] Plaintiff, while in defendant's employ as a brakeman, was injured by a defect in defendant's road-bed, of which the section foreman, whose duty it was to keep the road-bed in repair, had notice. *Held*, that the negligence of such foreman was the negligence of the company, and that defendant was liable. *Lewis v. St. Louis, etc., R. R. Co. (Mo.)*, 385.*
6. *Liability of servant to master for damages occasioned through negligence.] Goods intrusted to a common carrier for carriage were injured en route by the negligence of the carrier's servant in charge of them. The carrier*

settled for the damage with the owner of the goods and brought this action against the servant. *Held*, that he could recover of the servant the amount paid to the owner if it did not exceed the actual damage. *Smith v. Foran* (Conn.), 647.

7. *Liability of master for injury occasioned by servant in reckless enforcement of orders.*] Plaintiff jumped upon the baggage car of defendant's train. The baggageman ordered him off; the plaintiff replied that he could not get off because of a pile of wood beside the track. Whereupon the baggageman kicked him off and he fell against the wood, and then under the cars, and was injured. Defendant's rules forbade persons riding on the baggage cars, and required baggagemen to strictly enforce the order. *Held*, that the court was correct in charging the jury that, although the plaintiff was a trespasser, if the baggageman, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, the defendant was liable; but that if he was acting willfully and maliciously toward the plaintiff outside and in excess of his duty, the defendant was not liable. *Rounds v. Delaware, Lackawanna and Western R. R. Co.* (N. Y.), 597.

Seduction of servant—when relation exists.] See SEDUCTION, 586.

Public charitable institution when not reliable for negligence of servants.] See CHARITY, 589.

MECHANICS' LIEN.

1. *Gas-fixtures.*] "Gas-fixtures," such as chandeliers, side-brackets, etc. are not subject to a mechanic's lien under an act extending the mechanic's lien law to "plumbing, gas-fitting," etc. *Jarecki v. Philharmonic Society* (Penn.), 78, and *note*, 80.
2. *Sale of house.*] Per SHARSWOOD, J. On the sale of a house the gas-fixtures do not go with it in the absence of an express or implied agreement to that effect. *Ib.*

MINING.

1. *Support of surface.*] The owner of a coal mine in working it removed the "ribs" of coal which supported the roof, by reason whereof the surface sank and surface water flowed into the mine and thence into the mine of an adjoining owner. *Held*, that the former was liable to the latter for the damage, though he had worked according to the usages of miners and without negligence. *Horner v. Watson* (Penn.), 55.
2. *Custom.*] The mining right is servient to the surface to the extent of sufficient supports to support it, and a custom to the contrary is not good. *Ib.*
3. *Support of surface—custom.*] The owner of land conveyed the coal beneath the surface "and all the privileges necessary for the convenient working of said coal * * * and all rights and privileges incident or usually appurtenant to the working and using of coal mines." *Held*, that the grantee could not remove the surface support, and that evidence of a custom to the contrary was not admissible. *Coleman v. Chadwick* (Penn.) 88.

4. *Loss of springs.*] The grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine. *Ib.*

MISDEMEANOR.

- Contract for compounding.*] See CONTRACTS, 524.

MISTAKE OF FACT.

- Defence of, in criminal case.*] See CRIMINAL LAW, 266.
In payment of altered bill.] See NEGOTIABLE INSTRUMENTS.

MISTRIAL.

- Discharge of jury in absence of prisoner.*] See CRIMINAL LAW, 261.
When bail will be taken after.] See CRIMINAL LAW, 293.

MORTGAGE.

1. *On property not in esse — lien in equity.*] Where a mortgage is executed on an unplanted crop, a lien attaches in equity, as soon as the subject of the mortgage comes into existence, and, in a proceeding to foreclose, will be enforced against the mortgagor and those holding under him with record notice. *Apperson v. Moore* (Ark.), 170.
 2. *Of crops to be planted.*] The lessee of land in possession executed a mortgage of the crops to be raised by him the coming season and which were not yet planted. *Held*, that the mortgage was valid. *Argue v. Wasson* (Cal.), 718.
When mortgage is estopped by statements made in his presence.] See ESTOPPEL 249.

MUNICIPAL CORPORATION.

1. *Assessment for betterments.*] The power in a municipal corporation to make betterments at the expense of adjoining property owners is a power of special taxation and must have explicit legislation to support it. *Wistar v. Philadelphia* (Penn.), 112.
 2. *Limit of the power.*] A city was authorized by law to "prescribe by ordinance that paving of streets and of footways should be done at the expense of the owners of ground" fronting them. *Held*, that this did not confer upon the city power to tear up a pavement which was good and in no need of repair, and to relay and charge the owner again with one excessively costly. *Ib.*
 3. *By-laws — infraction of.*] A municipal corporation was authorized by its charter to make by-laws and punish their infraction by fine or imprisonment. *Held*, that this did not authorize imprisonment for non-payment of a fine imposed by a by-law. *Briswick v. Mayor of Brunswick* (Ga.), 240.
 4. *Limit of liability.*] A municipal corporation, having power under its charter to make ordinances for the safety of property in the city, suspended for a short time the operation of an ordinance forbidding the use of fire-works within the city. During such time plaintiff's building was set on fire and destroyed by fire-works negligently used by boys.

Held, that the corporation was not liable for such destruction. *Hill v. Board of Aldermen* (N. C.), 451, and *note*, 458.

5. *Officer retaining salary out of moneys collected.*] Defendant was a municipal officer, one of whose duties was to collect dues and deposit them in the city treasury. He was entitled by law to a fixed salary which was to be paid in a specified manner. *Held*, that he was not entitled to retain the amount of his salary from the dues collected. *City of New Orleans v. Finnerty* (La.), 568.

Not subject to garnishment for salaries of officers.] See ATTACHMENT, 276.

Division of, into wards—apportionment of representation.] See CONSTITUTIONAL LAW, 465.

Ordinance giving privileges to certain classes void.] See CONSTITUTIONAL LAW, 558.

Taxation for private purposes.] See CONSTITUTIONAL LAW, 586.

MURDER.

Insanity as a defense.] See INSANITY, 609.

NAME.

Christian name—initial letters.] Defendant was charged with an assault on "George W. Shott;" the proof was of an assault on "George Shott." *Held*, that as the law recognizes but one Christian name, the "W." was surplusage, and there was no variance. *Olsen v. State* (Ind.), 179, and *note*, 181.

NATIONAL BANK.

1. *Usury—set-off.*] In an action by a national bank on negotiable paper discounted by it, the defendant may set off the amount of usurious discounts on other transactions. The interest paid by the defendant beyond that authorized by the Act of Congress belongs to him, and the bank can hold it only for his use. *Lucas v. Government Nat. Bank* (Penn.), 17.
2. *Limitation of action.*] In such action a State statute, limiting the time within which actions to recover excessive interests may be brought, does not apply. *Ib.*
3. *Deposits for safe-keeping—liability of bailee.*] In an action against a national bank to recover bonds deposited with it for safe-keeping, without compensation, and which the bank alleged were stolen from its vaults, *held*, (1) that the bank was liable only for gross negligence; (2) that its failure to give prompt notice of the robbery was a question for the jury as bearing on the question of negligence; and (3) that while the mere voluntary act of the cashier in receiving the funds would not subject the bank to liability, yet if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the defendants would be held bound. *First Nat. Bank of Carlisle v. Graham* (Penn.), 49.
4. *Taking security on real estate by, ultra vires.*] A national bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined. *Matthews v. Skinker* (Mo.), 425.

NEGLIGENCE.

1. *Of railroad in setting fire to adjoining property — contributory negligence.]*
In an action against a railroad company for negligently burning property adjoining its line, *held*, that the company's negligence being proved, and that the loss arose from it, the condition of the plaintiff's property is no defense. *Philadelphia & Reading R. R. Co. v. Hendrickson* (Penn.), 97.
 2. *—.]* Plaintiff's barn, near defendant's line, was negligently burned by sparks from the locomotive. *Held*, that it was no defense to an action for the damages that the roof of the barn was in such condition as to be liable to take fire. *Ib.*
 3. *Of railroad in setting fire to adjoining property — proximate cause.]* Fire was communicated by a locomotive to a cross-tie of the track and spread thence through rubbish and dry grass to plaintiff's lands, about six hundred feet from the railroad. *Held*, that it was for the jury to determine whether the injury to plaintiff's land was the natural and probable consequence of the first firing. *Pennsylvania R. R. Co. v. Hope* (Penn.), 100.
 4. *Dangerous premises — liability of owner to one frequenting on business.]* Plaintiff went at night to defendant's house to buy oats. Defendant had no oats that he wished to sell, but by reason of plaintiff's importunity he agreed to sell him some, and they went together to the barn where the oats were kept. While defendant was seeking a measure, plaintiff walked about the barn in the dark, fell through a hole in the floor and was injured. *Held*, that plaintiff was not liable. *Pierce v. Whitcomb* (Vt.), 120.
 5. *Injury to trespasser — dangerous premises.]* A laborer, employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. *Held*, that he was a mere intruder, and that the owners of the vessel were not liable for the injury. *Severy v. Nickerson* (Mass.), 514.
 6. *Right of one not a passenger on a railway train.* Plaintiff went on board defendant's railroad train, not as a passenger, but to find seats for a lady and child whom he had in charge. After finding the seats he attempted to get off the train and in so doing was injured. *Held*, that even though he got off after the train was in motion, yet if sufficient notice of the start and a reasonable time to get off were not given, the company was liable. *Doss v. Missouri, etc., R. R. Co.* (Mo.), 871.
 7. *Exemplary damages.]* A railroad company is not liable to exemplary or punitive damages for injuries occasioned through the acts of its agents unless such acts are wanton or malicious. *Ib.*
- Of creditor in collecting collateral securities.]* See DEBTOR AND CREDITOR, 29.
- Of bank in keeping special deposits.]* See NATIONAL BANK, 49.
- Of maker of promissory notes.]* See NEGOTIABLE INSTRUMENTS, 75.
- Of one servant resulting in injury to another.]* See MASTER AND SERVANT.
- Of servant — servant's liability to master for.]* See MASTER AND SERVANT, 643.
- Of servants of a public charitable institution.]* See CHARITY, 539.
- Injury to one traveling on Sunday.]* See SUNDAY, 538.

NEGOTIABLE INSTRUMENTS.

1. *Promissory note—execution of, procured by fraud—liability of maker.*] The defendant signed an agreement constituting him an agent for the sale of a patented article, which agreement was so framed that a part of it could be cut off, leaving a perfect negotiable note. It was so cut without defendant's knowledge and the resulting note transferred for value to plaintiff. *Held*, that defendant was not liable in the absence of negligence, and that the question of his negligence was for the jury. *Brown v. Reed* (Penn.), 75.
2. *Negligence of maker.*] "If the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity." *Ib.*
3. *Indorsement without recourse—effect of.*] An indorsement without recourse implies a warranty that the note indorsed is valid. *Hannum v. Richardson* (Vt.), 152.
4. *Promissory note—consideration—agreement not to drink intoxicating liquors.*] A promissory note was made payable on condition that the payee abstain for a certain time from the use of intoxicating liquors. *Held*, that the consideration was good. *Lindell v. Rokes* (Mo.), 895.
5. *Interest, when payable—parol evidence to contradict note.*] A promissory note was made payable five years from date "with interest from date at the rate of eight per cent per annum." *Held*, (1) that on the face of the note the interest was payable at the maturity of the note and not annually; and (2) that the language being plain and unequivocal, parol evidence of an agreement to pay interest annually was not admissible. *Kochring v. Muemminghoff* (Mo.), 402.
6. *Negotiability—agreement in, to pay attorney's fees.*] A bill of exchange, in form negotiable, had an agreement indorsed upon it "to pay a reasonable attorney's fee to any holder thereof if the same shall hereafter be sued upon." *Held*, that the indorsement did not destroy the negotiability of the bill. *Gaar v. Louisville Banking Co.* (Ky.), 209, and *note*, 212.
7. —.] An instrument in the form of an ordinary promissory note contained also a promise "to pay an additional sum of ten per cent as attorney's fee" if the note was not paid at maturity and was placed in the hands of an attorney for collection. *Held*, (1) not a promissory note, and (2) that authority to an agent to make promissory notes in the name of his principal did not authorize the execution of such an instrument. *First National Bank v. Gay* (Mo.), 480.
8. *Ratification.*] If a man's name be signed to a contract without his authority, he may render himself liable on the contract by ratifying it, without a new consideration. *Ib.*
9. *Agency—execution of instrument by agent.*] An agent having authority may render his principal liable on an instrument not under seal, by signing his principal's name only, without any indication of agency. *Ib.*
10. *Accommodation note—title.*] Defendant made a note for the accommodation of a firm who procured its discount at a bank. A partner in the firm bor-

rowed money from plaintiff to take up the note and after it was due took it up and sent it to plaintiff. *Held*, that plaintiff took title to the note from the partner and not from the bank and could not recover against defendant thereon. *Lancey v. Clark* (N. Y.), 604.

11. *Bill of exchange — acceptance.*] The words "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawee, do not of themselves necessarily import an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible. *Cook v. Baldwin* (Mass.), 517.
12. *Part payment.*] A part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder. *Ib.*
13. *Mistake of fact — payment of altered bill by drawee.*] The drawees of a bill are only held to a knowledge of the signature of their correspondent, while the holder of the bill is held to a knowledge of every other fact in respect to it. Accordingly, where the holder of a bill, the amount in which had been altered from \$27 to \$2,750, presented it to the drawee, by whom it was paid, *held*, that the drawee was entitled to recover back the amount paid on discovering the mistake. *White v. Continental National Bank* (N. Y.), 612.
14. *Laches.*] The bill was presented and paid August 17. By a delay in examining the advices of the drawee the alteration was not discovered until October 5. *Held*, not to bar a recovery. *Ib.*

Deposit of checks in bank.] See CHECK.

When forbearance does not discharge surety.] See SURETY, 603.

NEW TRIAL.

See CRIMINAL LAW, 154, 281, 745.

NOVATION.

See ACTION, 382.

NUISANCE.

1. *On leased premises — when landlord liable for.*] Defendant, being the owner of land on which was a kiln for drying lumber, leased the same, knowing that the kiln would be used by the lessee for drying lumber, and knowing, or having reason to know, that such use would be dangerous to plaintiff's adjoining property. *Held*, that defendant was liable to plaintiff for injuries occasioned to his adjoining property by the kiln. *Helwig v. Jordan* (Ind.), 189.
2. *Action for. Parties — husband and wife.*] A nuisance was created near a house whereby the house was made unwholesome and the tenant's wife sick. *Held*, that, although the tenant had a right of action therefor and could recover damages for the injury to his wife's health, yet such action accrued to him solely as occupier of the house, and, therefore, that after his death the wife could maintain no action. *Ellis v. Kansas City R. R. Co.* (Mo.), 486.

Measure of damage in action for.] See DAMAGES, 42.

OFFICER.

1. *Resignation of—when holding of one office disqualifies for another.]* A person holding a lucrative office under the United States government was elected sheriff of a county for the term commencing July 1 then next. On the 19th of June he sent in his resignation of the Federal office to take effect on the 30th of June. The resignation was not accepted until July 3, and on the morning of July 1st he completed his duties as such officer before attempting to act as sheriff. *Held*, that his term of office had not expired on July 1st, and that, therefore, he was disqualified from holding the office of sheriff under a statute providing that no person holding a post of profit under the United States government should hold any State office. *Bunting v. Willis* (Va.), 888.

2. *Officer de facto—when acts of, valid.]* Respondent was appointed clerk of a court by the *de facto* judge, who was then exercising judicial functions. *Held*, that the subsequent ouster of the judge would not oust respondent, but he could hold against the appointee of the judge *de jure*. *People v. Staten* (N. C.), 479.

County treasurer, liability of.] See COUNTY TREASURER, 197.

Public, salaries of, not subject of garnishment.] See ATTACHMENT, 373, 374.

Right in executing warrant for arrest—breaking doors.] See ARREST, 511.

Vacancy in office of governor.] See CONSTITUTIONAL LAW, 551.

Right of municipal officer to retain salary out of moneys collected.] See MUNICIPAL CORPORATIONS, 568.

ORDINANCE.

See MUNICIPAL CORPORATION, 451.

PARDON.

Does not relieve from costs.] Under a statute providing that "every person convicted of an offense shall pay the costs of the prosecution," *held*, that a pardon would not relieve from liability for costs. *State v. Mooney* (N. C.), 487.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

In action for injury to wife's health.] See NUISANCE, 436.

PARTNERSHIP.

Debtor of partnership not subject to garnishment in suit against one partner.] See ATTACHMENT.

Sale by one partner to the firm is not such transfer as avoids policy.] See INSURANCE, 544.

PATENTS.

1. *Right of State legislature to interfere with sale of.]* A State statute required foreign corporations, as a condition precedent to the transaction of their business in any county of the State, to deposit in the office of the county

clerk a power of attorney, authorizing their agents to transact business for them, and the service of process on said corporations by service on such agents. *Held* not to apply to corporations engaged in the manufacture and sale of articles covered by letters patent. *Grover & Baker Sewing Machine Co. v. Butler* (Ind.), 200.

- 2 *Limiting sale of patented articles.*] A State statute provided for the inspection of illuminating oils, and forbade the sale of any that would not stand a prescribed test. *Held*, that the prohibition was constitutional as applied to oils patented under the laws of the United States, as well as in other cases. *Patterson v. Commonwealth* (Ky.), 220.

PAYMENT.

Of interest on promissory note — when due.] *See* NEGOTIABLE INSTRUMENT, 402.

PERJURY.

Before United States commissioners.] *See* JURISDICTION, 272.
Evidence of — sufficiency.] *See* CRIMINAL LAW, 365.

POLICE POWER.

See CONSTITUTIONAL LAW, 763.

PRINCIPAL AND ACCESSORY.

See CRIMINAL LAW, 459.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

See ARREST, 470.

PRIVITY.

See JUDGMENT, 417.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROXIMATE CAUSE.

See NEGLIGENCE, 100.

PUBLIC SCHOOL.

See SCHOOL.

PUBLIC OFFICER.

See COUNTY TREASURER; OFFICER.

RAILROAD.

1. *Recovery for services performed before incorporation.*] In an action against a railroad company to recover the value of services performed before the incorporation, in procuring the charter, making surveys, etc., *held*, that plaintiff could not recover, in the absence of proof that a majority of the corporators or promoters of the corporation authorized the service. *Bell's Gap R. R. Co. v. Christy* (Penn.), 89.
 2. *Effecting passenger who has lost his ticket.*] Plaintiff bought a ticket over defendants' road with coupons attached. A conductor detached one of the coupons and gave him instead a conductor's check. Before reaching the point for which such check was given, another conductor took the train and demanded the check. Plaintiff could not find it, but tendered him the ticket with the remaining coupons, which was refused, and plaintiff was ejected, without unnecessary force. *Held*, that defendants were justified. *Jerome v. Smith* (Vt.), 125.
 3. *Damages — exemplary.*] A railroad company is not liable to exemplary or punitive damages for injuries occasioned through the act of its agents unless such acts are wanton and malicious. *Doss v. Missouri, etc., R. R. Co.* (Mo.), 871.
- Liability for setting fire to adjoining property.*] See NEGLIGENCE, 97, 100.
- Negligence in starting train — notice that train is about to start.*] See NEGLIGENCE, 871.
- Right to regulate rates.*] See CONSTITUTIONAL LAW, 897.
- Right to change gauge.*] See CONSTITUTIONAL LAW, 478.

RAPE.

- Assault with intent to commit.*] See CRIMINAL LAW, 496, 754.

RATIFICATION.

- New consideration not necessary.*] If a man's name be signed to a contract without his authority he may render himself liable on the contract by ratifying it without a new consideration. *First National Bank v. Gay* (Mo.), 480.

"REASONABLE DOUBT."

- Proof beyond, not required in civil cases.*] See EVIDENCE, 233.

RECORDS.

- Of deeds — right of citizens to inspect.*] See REGISTRY OF DEEDS, 233.

REGISTRY OF DEEDS.

- Right of citizens to inspect.*] By statute all books kept by any public officer were subject to the inspection of all citizens, and when the officer's aid was required on such inspection he was entitled to a fee. *Held*, that no one was entitled without payment to examine the public record of deeds to make abstracts of such records for publication. *Buck v. Collins* (Ga.) 236.

REGISTRY LAW.

- Cannot disfranchise electors.*] See CONSTITUTIONAL LAW, 436.

REMOVAL OF SUITS.

To federal courts — removal by corporation.] An officer of a foreign corporation sued in a State court cannot (at least without special authority) make the affidavit required by the act of Congress of 1867, for the removal of the suit to the United States Circuit Court, as that act requires an affidavit of the defendant's own belief. *Quigley v. Central Pacific R. R. Co.* (Nev.), 757.

RES GESTÆ.

See EVIDENCE, 330.

RESIGNATION.

Of office, when perfected.] See OFFICER, 333.

RESTRAINT OF TRADE.

Aiding others in carrying on trade — injunction.] A woman sold a bakery and covenanted that she would not "engage in the same business directly or indirectly" in the same place for ten years. Within that time she established her son in the same business within the limits of the same place, advancing him money as she had done to her other children in their business. It was found as a fact that the business was carried on in good faith by the son and not by the mother, and no actual damage to the plaintiff was shown. *Held*, that the plaintiff was not entitled to an injunction to restrain the mother from permitting or aiding her son to carry on the business. *Herkinson's Appeal* (Penn.), 9.

RIGHT OF WAY.

See WAY, 519.

ROBBERY.

Indictment — description of property.] An indictment for the robbery of bank bills, which alleges the value of the bills but not their denomination, is bad. *Arnold v. State* (Ind.), 175.

SAFE DEPOSITS.

Right of national bank to receive.] See NATIONAL BANK, 49.

SALE.

Of houses — gas fixtures do not pass.] See FIXTURES, 73, and note, 80.

Of property not in case.] See MORTGAGE, 170, 718.

Of lands — deficiency — measure of damage.] See VENDOR AND PURCHASER, 317, 320.

Of real estate at auction.] See STATUTE OF FRAUDS.

SAVINGS BANKS.

Deposits in — set-off.] See SET-OFF, 641.

SCHOOL.

Right to exclude from, for non-attendance—what will not excuse non-attendance.] A school committee which was authorized by statute to adopt all requisite measures for the regulation of the school, excluded children from the school for absence, contrary to the rules thereof. *Held*, valid, although such absence was pursuant to the command of their Roman Catholic parents and their priest, and for the purpose of attending religious services on a holiday of the church. *Ferriter v. Tyler* (Vt.), 188.

Teacher—salary, when not attachable.] See ATTACHMENT, 278.

SEDUCTION.

1. *Who may maintain action for.]* At the trial of an action for seduction it appeared that the injured girl, who was the sister of the plaintiff's wife, was, at the time of the seduction, taking care of the plaintiff's household, without paying board, during the sickness of the plaintiff's wife, upon an understanding with the plaintiff, but with no agreement with her father or herself as to the payment of wages, or for any definite period of service. *Held*, that this did not establish the relation of master and servant so as to give a right of action to the plaintiff. *Blanchard v. Reley* (Mass.), 586.

2. *Guardian.]* A guardian cannot, as such, maintain an action for the seduction of his ward. *Id.*

SENTENCE.

In criminal cases.] See CRIMINAL LAW, 7, 561.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

1. *Of deposit in savings bank against indebtedness to bank.]* Upon the insolvency of a savings bank, a depositor cannot set off his deposit against a debt due from him to the bank. *Osborn v. Byrne* (Conn.), 641.

2. *—.]* *Semble*, that if the deposit was made for the purpose of applying the same in payment of the indebtedness to that amount, and the officers of the bank had knowledge of such purpose, then set-off may be allowed. *Id.*

Of usurious interest.] See NATIONAL BANK, 17.

Not subject of.] See TAXATION, 292.

On novation of contract.] See ACTION, 582.

SHERIFF.

Right of, as assignee of judgment.] See JUDGMENT, 439.

SLANDER.

1. *General rumor in mitigation.]* In actions for slander, general reports of the truth of the charges are not admissible for any purpose. *Posey v. Shippen* (Penn.), 116.

2. *Particular charges.*] Under the plea of the general issue only, while the plaintiff's general character may be assailed, neither particular reports nor the general currency of the particular charge can be given in evidence. *Ib.*

STATUTES.

1. *Conclusives as enrolled—evidence to impeach.*] The official copy of a statute, duly enrolled and authenticated, is conclusive evidence of the law; and the court cannot resort to the journals of the legislature, nor to any other extrinsic evidence, to ascertain whether the statute was in fact duly enacted. *State v. Swift* (Nev.), 721.
2. *Enacting clause—omission of.*] The Constitution prescribed a formal enacting clause to precede statutes. *Held*, that an omission of such clause, or a part of it, rendered a statute void. *State v. Rogers* (Nev.), 723.

STATUTE OF FRAUDS.

1. *Verbal promise of indemnity to a surety.*] Defendant, a surety on a replevin bond, verbally promised plaintiff that if he would sign the bond as surety, the defendant would save him harmless from all damages therefrom. *Held*, that such promise was void under the statute as an agreement to answer for the default of another. *Bissig v. Britton* (Mo.), 379.
2. *Sale of real estate at auction.*] At an auction sale of real estate the property was struck off to defendant. No memorandum was signed, but the auctioneer went into his office, two hundred yards from the sale, and in defendant's absence began to draw a deed. Before the deed was finished he was informed that defendant refused to complete the purchase. *Held*, that the sale was invalid under the statute of frauds. *Guethney v. Cason* (N. C.), 484.

STOPPAGE IN TRANSITU.

When not effective as against assignee of bill of lading.] The vendor of goods shipped them by defendant's railroad to the vendee as consignee, with bill of lading in the usual form. While the goods were in transit the vendee became insolvent, and the vendor notified defendant to stop the goods. Shortly after such notification the vendee indorsed the bills of lading, in the usual course of business, to plaintiff, who, in good faith and without knowledge of the insolvency or of the stoppage, advanced money thereon. *Held*, that plaintiff, on tender of the freight and charges, was entitled to receive the goods from the carrier as against the vendor. *Newhall v. Central Pacific R. R. Co.* (Cal.), 713.

STREET.

Damages for lands taken for.] *See* DAMAGES, 522.

SUBROGATION.

See USURY, 609.

SUICIDE.

See INSURANCE, 543, note, 549.

SUNDAY.

Personal injury to one traveling unlawfully upon.] One who travels on the Lord's day to ascertain whether a house, which he has hired, and into which he intends to move the next day, has been cleaned, is not traveling from necessity or charity, and cannot maintain an action for injuries sustained at a railroad crossing, through the negligence of the servants of the railroad corporation. *Smith v. Boston & Maine R. R. Co.* (Mass.), 538, and note, 540.

Ordinance forbidding sale on — religious discrimination.] See CONSTITUTIONAL LAW, 558.

SURETY.

1. **Discharge of one surety by operation of law.]** One of several sureties for a debt notified the creditor upon the maturity of the debt to sue the principal debtors within thirty days, which he failed to do, whereby, by statute, the surety was discharged. *Held*, that his co-sureties who had given no notice remained liable. *Wilson v. Tobbette* (Ark.), 165.
2. **Discharge by acts of obligee.]** Defendant indorsed a note for the accommodation of the maker, who also gave the payee a mortgage as further security pursuant to an agreement between all the parties. The payee failed to have the mortgage recorded, and afterward canceled it and took another. *Held*, that defendant was discharged, and this even though the original mortgage would have been worthless if recorded, by reason of prior liens. *Atlanta Nat. Bank v. Douglass* (Ga.), 284.
3. **When forbearance to principal does not discharge surety.]** The principal debtor upon an overdue promissory note went with the money to pay it to the holder, who declined to receive payment and requested the debtor to keep the money, which he did. *Held*, not to discharge a surety on the note though the principal debtor was then solvent and became afterward insolvent. *Clark v. Sickler* (N. Y.), 606.
4. **Discharge of, by laches of obligee.]** The sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default in the absence of evidence of fraud and dishonesty on the part of the employee. *Atlantic & Pac. Tel. Co. v. Barnes* (N. Y.), 631.
5. **—.]** *Semble*, that the rule is otherwise where the default is of a nature indicating want of integrity in the employee, and this is known to the employer. *Ib.*
6. **Conditional contract — guardian's bond.]** A guardian's bond recited that it was executed by L. and P. as sureties. L. signed, but P. did not. *Held*, that L. could not show, as a defense to an action on the bond, that he was induced to sign by a promise that P. would also sign it, which promise he had always believed was fulfilled. *State v. Lewis* (N. C.), 461.
7. **Purchase of lands subject to judgment — release of lien of judgment.]** B. purchased lands subject to a judgment of which he was ignorant, paying

value and taking a deed with covenants. Subsequently an appeal was taken by the judgment debtor, and the judgment secured by an undertaking. *Held*, that as to the judgment B. occupied a position similar to that of surety, and a release by the judgment creditor of the sureties on the undertaking discharged the lien of the judgment upon the lands purchased by B. *Barnes v. Mott* (N. Y.), 625.

On bail bond — defense — sickness of principal.] See BAIL, 62.

On bail bond — arrest of principal on bench warrant.] See BAIL, 222.

Promise of indemnity — statute of frauds.] See STATUTE OF FRAUDS, 272.

Conditional execution — delivery in violation of.] See BOND, 440.

TAXATION.

1. *Not the subject of set-off — enjoining collection of tax.] A person lawfully taxed by a municipal corporation cannot set off a debt due him from the corporation against the tax; nor will equity enjoin the collection of the tax until the debt is paid; nor because of a failure to recover the debt through the ordinary legal remedies; nor because of irregularities in the notice of time and place of sale. *Finnegan v. City of Fernandina* (Fla.), 222.*

2. *"Credits" not property.] A State constitution provided that "all property shall be taxed in proportion to its value." Held, that debts due were not property and were not, therefore, taxable. *People v. Hibernia Bank* (Cal.), 704.*

Of municipal corporations for private purposes.] See CONSTITUTIONAL LAW, 586.

Unequal — special license.] See CONSTITUTIONAL LAW, 765.

TENANTS IN COMMON.

*Exclusive occupation by one tenant — interest in crops grown on common property.] Where one tenant in common occupies and cultivates the common estate, to the exclusion of his co-tenants, the latter have a right to an account of the profits of the crops produced, but no property in the crops; and, therefore, a mortgage of such crops by the occupying tenant is good against his co-tenants and the mortgagee is not liable to account to them. *Bird v. Bird* (Fla.), 226.*

TIME.

Computation of, under statute of limitation.] See LIMITATION OF ACTIONS, 122, 624.

TORT.

Action of, for damages arising from contract.] See ACTION, 120.

See JOINT TORT-FEASORS, 214.

TRADE.

See RESTRAINT OF TRADE.

TRESPASS.

Dangerous premises — liability of owner.] See NEGLIGENCE, 120, 514.

TRIAL.

1. *Sentence — neglect to ask why sentence should not be pronounced.]* The record of a capital conviction failed to show that, before sentence, the prisoner was asked if he had any thing to say why sentence should not be pronounced. *Held*, that the sentence should be reversed and the prisoner remanded for re-sentence. *McQue v. Commonwealth* (Penn.), 7, and note, 8.
 2. *—.]* It is not necessary, though usual, to ask a person convicted of a crime, not capital, if he has any thing to say why sentence should not be pronounced against him. *State v. Taylor* (La.), 561.
 3. *Criminal trial — degree of crime — second trial.]* Where a person indicted for murder has been convicted of murder in the second degree and a new trial is granted, he cannot, on the second trial, be convicted of murder in the first degree. *Johnson v. State* (Ark.), 154.
- Discharge of jury in absence of prisoner.]* See CRIMINAL LAW, 281.
- Failure of jury to specify degree of crime.]* See CRIMINAL LAW, 745.

See EVIDENCE.

TRUSTEES.

See EXECUTORS AND ADMINISTRATORS.

ULTRA VIRES.

See NATIONAL BANK.

USAGE AND CUSTOM.

When not good.] See MINING, 55, 98.

As affecting liability of carriers.] See CARRIER, 597.

USURY.

In renewal contract does not taint old contract.] Plaintiff advanced money to pay a mortgage, taking another mortgage to secure the advance. The second mortgage was declared void for usury. *Held*, that the usury did not affect the first mortgage, and the second mortgage being void the prior mortgage revived and could be enforced by plaintiff. *Patterson v. Birdsell* (N. Y.), 609.

See NATIONAL BANK.

VENDOR AND PURCHASER.

1. *Deficiency in land sold — measure of damages.]* Defendant sold to plaintiff a tract of land with valuable buildings thereon, representing and believing that it contained 127 acres. It contained in fact only 81 acres. *Held*, that plaintiff was entitled to compensation for the deficiency, according to the average value of the land without the buildings, taking the price paid for the land with the buildings as the true value of both together. *Heback v. Kilgore* (Va.), 817.

2. *General warranty.*] A vendor of real estate in his own right is bound to convey the same with general warranty unless it be otherwise agreed between the parties. *Id.*

3. *Effect of words "more or less" in deed—deficiency.*] Defendant agreed to sell to plaintiff a tract of land "containing one hundred and sixty-six acres." The deed made pursuant thereto purported to convey that amount "more or less;" but there were, in fact, only one hundred and fifty-six acres. *Held*, that the purchaser was entitled to compensation for the deficiency. *Triplatt v. Allen* (Va.), 820.

Of goods — stoppage in transitu.] *See* STOPPAGE IN TRANSITU, 712.

WARRANTY.

Implied on indorsement of note.] *See* NEGOTIABLE INSTRUMENT, 188.

WATER-COURSE.

Action for diversion of.] *See* DAMAGES, 42.

WAY.

Right of — adverse user.] When a right of way to certain land exists by adverse use and enjoyment only, proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition. *Parks v. Bishop* (Mass.), 519.

See HIGHWAY.

WILL.

Equity — lost will — proof of — jurisdiction.] Bill in equity against an executor alleging that defendant's testatrix had unlawfully destroyed the will of R., of whom she was the sole heir and which will gave her a life estate only in R.'s property, remainder to plaintiff; that the witnesses to the said will were dead, and that by reason of the destruction plaintiff could not set out a copy of the said will. Prayer that the defendant might be decreed to hold the property in trust for plaintiff. *Held*, on demurrer, that the bill was sustainable without proof of the lost will in the Probate Court. *Harris v. Ticeanu* (Ga.), 242.

WORDS.

"Absence from the State."] *See* GOVERNOR, 551.

"Fallen building."] *See* INSURANCE, 708.

"Fiduciary character."] *See* BANKRUPTCY, 554.

"Imprisonment for debt."] *See* ARREST, 470.

"More or less."] *See* VENDOR AND PURCHASER, 820.

"Necessity or charity."] *See* SUNDAY, 538.

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Dangerous premises — Liability of

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